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The Right to Asylum and its Protection

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PhD in Political Theory

The University of Edinburgh

2012

The Right to Asylum and its Protection

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Declaration

15th February 2012

I declare that, except where otherwise indicated, the thesis is entirely my own work, and that no part of it has been submitted for any other degree or professional qualification.

Jaakko Kuosmanen

Abstract:

The topic of this thesis is justice and asylum. The central argument in the thesis is that citizens of all states have a moral right that entitles them to asylum in certain circumstances of deprivation. The right to asylum can be understood as a general derivative right, and it is grounded in the more fundamental entitlement to basic needs. More specifically, I argue that all persons whose basic needs are insufficiently protected in their home states have the right to asylum when they cannot be assisted with other remedial instruments by the international community within a reasonable timeframe. By using the right to asylum as a normative evaluative standard, I also argue that the existing refugee protective institutions are morally unsatisfactory, and that a 'moral refugee regime' should be established to replace the current protective institutions. Then the question becomes, what specific form these institutions should take. In the thesis I focus primarily on one institutional proposal, 'the tradable quota scheme', and its ethical dimensions. I defend the tradable quota scheme against several lines of criticism, and suggest that the scheme constitutes a normatively viable alternative for the existing institutional framework. Finally, I examine obligations in the protection of the right to asylum in circumstances of partial compliance. I conclude that the citizens of complying states have the obligation to 'pick up the slack' and assist those bearers of the right to asylum who are unjustly denied assistance by the non-complying states.

Keywords: The right to asylum, refugees, justice, duties, institutions.

Acknowledgments

This thesis is dedicated to my mother and my father. I am grateful for the unconditional love and support they have given me throughout the years.

First and foremost I wish to thank my supervisors Lynn Dobson and Liz Cripps who have offered me intellectual support and challenged my thinking over the years. Without their efforts the thesis would not be what it is today. I also wish to thank Cécile Fabre, who offered important guidance at the early stages of the project.

I am deeply indebted to Sami Pihlström, who has been an important supporter of the project from the beginning. Without his help the project would not have been possible. I am also grateful to the core members of the Political Theory Research Group at the University of Edinburgh, Tim Hayward, Arabella Millet, Liz Ellis, and Richard Gunn for their comments and constructive criticism. The group's dedication has been impressive, and it will be missed. I also wish to thank Ewen McIntosh and Rob Duncan for the countless of stimulating discussions. While at times bordering obscurity, their intellectual approaches to dissecting the social world around us never stops surprising and impressing me. I have had the privilege to enjoy a wonderful work environment, and for this I am grateful to my fellow office mates Jan Braun, Amanda Wittman, Meryl Kenny, Toni Haastrup, Chris Ogden, Konstantinos Kostagiannis, Hilary Cornish, Victoria Loughlan, Charlotte Rommerskirchen, and Catherine-Rose Stocks. The School of Social and Political Science has too many wonderful persons to thank individually, so I wish to thank collectively all of those who at the School have assisted me during the years. The project would not have been possible without the scholarships I have received from many different sources. Thus, I am thankful for the generous support of British Council, The School of Social and Political Sciences, Emil Aaltonen Foundation, Oskar Öflund Foundation, The City of Tampere, Finnish Academy of Science and Letters, and Finnish Academy.

Finally, I am deeply grateful to my wife Minna who has patiently stood by my side, giving me comfort during times of despair and sharing with me the important moments of happiness. Our trip through life is something words cannot express.

'The world is failing these people, leaving them to wait out the instability back home and put their lives on hold indefinitely. Developing countries cannot continue to bear this burden alone and the industrialized world must address this imbalance. We need to see increased resettlement quotas.'

-António Guterres, The UN High Commissioner for Refugees, June 2011¹

1. Introduction

On the 26th of March 2011 a Libyan postgraduate law student Iman al-Obeidi received worldwide attention by walking into a hotel in Tripoli filled with western journalists covering the Libyan conflict. Al-Obeidi burst into tears in front of the journalists, claiming loudly that she had been held against her will for two days while being severely beaten and raped by 15 men serving in Colonel Gaddafi's troops. The Libyan security service members present at the hotel were quick to intervene in the situation. They rushed Al-Obeidi out of the public eye, violently taking her with them to an unknown destination. Immediately after the incident, a representative of the government was quick to vilify Al-Obeidi as 'drunk', 'mentally ill', 'prostitute', and a 'thief'. The government was aware of the worldwide publicity she had received, and that journalists were following closely any further developments in the situation. Al-Obeidi having already become a symbol of resistance against Gaddafi, the government released her from detention. Fearing for her life and safety, she escaped Libya shortly after her release with the assistance of the rebel forces, and ended up seeking asylum in Qatar. However, the government of Qatar deported her quickly by force, and she ended up flying back to Libya in a Qatari military plane. She went into hiding in Libya, until she was eventually granted asylum in the United

¹ UNHCR, 'World Refugee Day: UNHCR report finds 80 per cent of world's refugees in developing countries'. Available online: <http://www.unhcr.org/4dfb66ef9.html> (accessed 19.07.11).

States in early June 2011, allegedly with the help of Foreign Secretary Hillary Clinton.

While Al-Obeidi faced extremely harsh treatment in her home country, all things considered she was lucky. She received the close attention of many in the Western world who were in a position of power. Her fate was directly linked to the propaganda war against the Gaddafi regime, and this may have been one of the reasons why she received fast-track asylum in a Western country. When the war broke out there were many other Libyans who were not as lucky as Al-Obeidi. Many attempted to escape from violence unsuccessfully, and ended up facing a gruesome fate. There were also thousands who managed to flee to the borders of the neighbouring states in their search for shelter. But the voices of these persons were not heard as loudly in the Western countries as the voice of Al-Obeidi. Some of these 'voiceless' decided to try to get across the Mediterranean Sea to Europe with unfortunate consequences.² In the early months of the war, it is estimated that more than a million people fled across the border from Libya to Tunisia, Egypt, Algeria, Niger, and Chad. Facing political turmoil of their own, some of the neighbouring countries were understandably not in the best position to assist the fleeing persons when the conflict broke out. Many of those fleeing from Libya aimed to seek asylum in Italy, France, and Britain. But the immediate European response to persons fleeing the turmoil of the 'Arab spring' was a grudging one. The leaders of European countries were primarily interested in how to keep out people who were trying to seek shelter.³

The reaction of European countries to the Libyan crisis is not a surprising one. When faced with humanitarian crises that are pushing people to flee their home countries, the response of developed Western countries has often been slow and small-scale to say the least. The limited response is backed by public opinion in many countries. In

² The Telegraph reported that in the first two months of the war, at least 800 persons drowned in the Mediterranean Sea attempting to flee the Gaddafi regime to Europe. Available online: <http://www.telegraph.co.uk/news/worldnews/africaandindianocan/libya/8505936/Libya-800-refugees-drowned-trying-to-escape-Gaddafi.html> (accessed 19.07.11).

³ Jo Coghlan, 'Arab Spring Refugees: The Cost of War', *Foreign Policy Journal* (2011), available online: <http://www.foreignpolicyjournal.com/2011/06/28/arab-spring-refugees-the-cost-of-war/> (accessed 19.07.11).

several developed countries there is a strong sentiment that the welfare system, cultural ethos, and societal peace are under a threat from incoming migratory movement, including the accommodation of those escaping their home countries due to violence and other forms of harm.⁴ It is true that in many countries there has been a noticeable rise in the number of incoming asylum seekers. For example, in 1972 the number of asylum applications lodged in the whole of Europe was 13,000. In 1980, the number was 180,000 and by 1991 there were 0.5 million applicants entering Europe.⁵ But in some developed countries the domestic population is also under the impression that the level of arriving asylum seekers is much higher than it is in reality.⁶ Right-wing parties have capitalised substantially on the current anti-immigration and anti-asylum public sentiment, advocating, among other things, 'sane policies' that more effectively deter the entry of asylum seekers. In many European countries the message of abandoning the existing 'unreasonably benevolent' asylum policies has been victorious in recent elections.⁷

The burdens of accommodating persons who are fleeing their home countries should, of course, be taken into consideration when drafting asylum policies. While some persons in need of protection may be 'desirable' migrants who would benefit the recipient country, this is not necessarily always the case. The persons in need of protection may also be members of noticeably different cultures, they may be elderly, they may not have any formal education, or they may not have a

⁴ According to the Transatlantic Trends Immigration Survey, 66% of the British, 58% of the Spanish, 54% of the Americans, 49% of the Italians, and 45% of the Dutch considered that immigration is 'more of a problem than an opportunity'. According to the same survey, 57% of the Spanish, 44% of the Americans, and 44% of the Dutch also considered that immigration is 'the most important issue facing the country today'. See Transatlantic Trends: Immigration 2009 Survey, 5-6. Available online: http://trends.gmfus.org/immigration/doc/TTI_2009_Key.pdf (accessed 19.07.2011).

⁵ Nadine El-Enany, 'Who is the New European Refugee?', *European Law Review*, 33 (2008), 319.

⁶ Nearly a quarter of the population of the UK, for example, wrongly believe that every year there are 100,000 asylum applicants entering the UK – a figure which is more than four times the actual number (25,670 in 2008). The average figure given by those taking the survey was 58,000, more than twice the actual number. British Red Cross Survey, 2008. Available online: <http://www.redcross.org.uk/About-us/Media-centre/Press-releases/2009/June/Public-massively-overestimate-numbers-seeking-refuge-in-UK-British-Red-Cross-survey-reveals> (accessed 19.07.2011).

⁷ On the rise of the right-wing populism in European countries, and especially in France, see Mabel Berezin, *Illiberal Politics in Neoliberal Times: Culture, Security, and Populism in the New Europe* (Cambridge: Cambridge University Press, 2009).

comprehensive general understanding of the functioning of the civil and political institutions of the recipient country. In such cases successful accommodation can be a burdensome effort requiring plenty of resources from the citizens of the recipient country. But while the burdens to the domestic population are often appealed to when advocating limited asylum policies, the normative dimensions of asylum are rarely considered. What exactly – if anything – does justice require from asylum policies set by the affluent states? Put differently, do some asylum seekers have a moral claim for protection in states capable of protecting them?

While considerations of justice are often appealed to in public debates on societal political issues, it is less common to hear arguments on the justification of denying protection to the destitute. But this is exactly what states are obligated to explain when rejecting an entry from non-citizens seeking protection. All things considered states owe not only a legal explanation but also a moral explanation to asylum seekers as to why their plea for protection has been rejected. The framing of the issues strictly in terms of legal arguments and in terms of possible burdens resulting from protection fails to show whether chosen actions of a state with regard to a particular group of asylum seekers are morally permissible. Are states acting in a morally permissible way when turning back asylum seekers at sea in order to prevent them from claiming asylum? Are states acting in a morally permissible way when depriving asylum seekers of food in order to persuade them to repatriate? Are states acting in a morally permissible way when protecting their citizens' non-fundamental needs over non-citizens' fundamental needs?

1.1 Setting the frame

The topic of the current thesis is 'justice and asylum'. In general terms, political philosophers have been approaching the idea of justice in two centrally different ways. Firstly, philosophers have examined justice in a restricted sense by focusing on isolated political communities, i.e., how exactly should a bounded political community be organised in order for it to be a just community? The most famous of such endeavours is John Rawls' *A Theory of Justice*, which sets to examine the way in which the 'basic structure of society' should be organised, or more precisely 'the

way in which the major social institutions distribute fundamental rights and duties and determine the divisions of advantages from social cooperation'.⁸ Apart from these isolated enquiries of justice, philosophers have engaged in examining issues of 'global justice'. Studies on global justice examine questions such as the extent to which the possible existence of bounded political communities, states, nationalities, cultures, and religious affiliations should be accepted as relevant factors when considering the distribution of goods and services.

The current thesis is an enquiry on global justice. The word asylum refers to a 'sanctuary', 'refuge', or a 'place of safety', and in the Middle Ages it was used to refer to protective practices churches engaged in. In the modern political use the word asylum has centrally referred to interstate protection of persons with a well-founded fear of persecution. Both of these uses of the term asylum suggest that when a person is granted asylum, the person is provided access to some form of delineated protective zone in which the person receives either a temporary or a permanent shelter from certain harms and threats of harm to which he or she would be vulnerable outside the zone. In the current study I will focus on asylum in the context of a world occupied by states that have jurisdiction over a delineated territory.⁹ More specifically, I will focus on the circumstances under which citizens of a state can have a claim to be provided access to the territories under the jurisdiction of other states and to be protected by these recipient states from certain harms and threats of harm to which they would be vulnerable outside the state.

⁸ John Rawls, *A Theory of Justice* (Harvard: Harvard University Press, 1999a), 6.

⁹ This framing of the enquiry is not, in the end, a conservative one. As John Rawls rightly points out, when the boundaries between political communities are viewed in isolation it is surely the case that they seem arbitrary and 'depend to some degree on historical circumstances', but 'in the absence of a world-state there must be boundaries of some kind'. John Rawls, *The Law of Peoples* (Cambridge and London: Harvard University Press, 1999b), 39. Many political theorists from Kant onwards have been critical of the idea of world-state. This has been also the case with many theorists who accept the starting-position of moral cosmopolitanism, i.e., the claim that 'individual is the ultimate unit of moral worth and concern'. Kok-Chor Tan, *Justice without Borders – Cosmopolitanism, Nationalism, and Patriotism* (Cambridge: Cambridge University Press, 2004), 94. See also Charles R. Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1999), 181-183. For a defence of the world government, see Kai Nielsen, 'World Government, Security, and Global Justice', in Stephen Luper-Foy (ed.), *Problems of International Justice* (Boulder: Westview Press, 1988).

Accessing asylum entails in many cases cross-border movement, but it is important to recognise that this does not necessarily have to be the case. Alternatively, access to asylum may be provided by extending the jurisdiction of a state or a group of states beyond their territorial borders and by creating a limited safety zone in the asylum seekers' home state. This method of providing access to asylum is mainly used in cases of substantial humanitarian crises requiring urgent response from the international community.¹⁰ To keep the analysis from drifting too far to the complex issues of territorial rights and humanitarian intervention in the current enquiry I will focus strictly on 'access to asylum' in the first sense. In other words, in the study asylum denotes a safe haven that is located on the jurisdictional territories of states other than the home state of the asylum seeker.

It should also be pointed out right away that in the study I will stop short of examining 'the ethics of migration'¹¹ in more general terms, i.e., the study does not offer an answer to the question of how open borders between states should be all things considered.¹² In enquiries on the ethics of migration, so far philosophers have

¹⁰ It should be pointed out that although often the intention behind the creation of safety zones is temporary protection, the sad reality in the current world is that there are thousands of persons around the world for whom this temporary solution has become a permanent one.

¹¹ For excellent introductory texts on the ethics of migration, see James L. Hudson, 'The Philosophy of Immigration', *Journal of Libertarian Studies*, 8 (1986), 51-62; Robert E. Goodin, 'If People Were Money...', in Brian Barry & Robert E. Goodin (eds.), *Free Movement – Ethical Issues in the Transnational Migration of People and of Money* (London: Harvester Wheatsheaf, 1992); Terry Nardin, 'Alternative Perspectives on Transnational Migration', in Brian Barry & Robert E. Goodin (eds.), *Free Movement – Ethical Issues in the Transnational Migration of People and of Money* (London: Harvester Wheatsheaf, 1992); Veit Bader, 'The Ethics of Immigration', *Constellations*, 12 (2005), 331-361; Jonathan Seglow, 'The Ethics of Immigration', *Political Studies Review*, 3 (2005), 317-334.

¹² The question of the right of states to limit migration has been approached from many different perspectives. For a seminal philosophical work on open borders see Joseph Carens, 'Aliens and Citizens: The Case for Open Borders', *The Review of Politics*, 49 (1987), 251-273. For libertarian enquiries on the right of states to limit migration, see Hillel Steiner, 'Libertarianism and the Transnational Migration of People', in Brian Barry & Robert E. Goodin (eds.), *Free Movement – Ethical Issues in the Transnational Migration of People and of Money* (London: Harvester Wheatsheaf, 1992); John Hospers, 'A Libertarian Argument against Open Borders', *Journal of Libertarian Studies*, 13 (1998), 153-165; Jesús Huerta de Soto, 'A Libertarian Theory of Free Immigration', *Journal of Libertarian Studies*, 13 (1998), 187-197; Chandran Kukathas, 'The Case for Open Immigration', in Andrew I. Cohen & Christopher Heath Wellman (eds.), *Contemporary Debates in Applied Ethics* (Malden: Blackwell Publishing, 2005); Jan Krepelka, 'A Pure Libertarian Theory of Immigration', *Journal of Libertarian Studies*, 22 (2010), 35-52. For liberal egalitarian enquiries on the right to limit migration see for example Veit Bader, 'Fairly Open Borders', in Veit Bader (ed.), *Citizenship and Exclusion* (Houndmills: Macmillan, 1997); Phillip Cole, *Philosophies of Exclusion – Liberal Political Theory and Immigration* (Edinburgh: Edinburgh University Press, 2000); Tan, *Justice without Borders*, 123-131; Eric Cavallero, 'An Immigration-Pressure Model of

not focused much on ‘the refugee problem’ and ‘the right to asylum’. Much more time and effort has been dedicated to the general question of how open the migration policies of states should be. Several philosophers have outlined accounts claiming that fully open borders between territorial states are a requirement of ideal justice. There are many different ways to defend fully open borders, and probably the most famous philosophical enquiry on open borders is outlined by Joseph Carens. Carens argues that exclusive ‘citizenship in Western liberal democracies is the modern equivalent of feudal privilege – an inherited status that greatly enhances one’s life chances’.¹³ Carens approaches the phenomenon of migration by examining three famous contemporary accounts of political theory, John Rawls’ egalitarian theory of justice, Robert Nozick’s libertarianism, and utilitarianism. He observes that all three theoretical frameworks start with some kind of assumption on the equal moral worth of individuals, and that in one way or another each of them holds the individual as prior to the community. Carens argues that this starting-position provides little basis for drawing a distinction between citizens and aliens who seek to become citizens. On his view, each of the aforementioned theoretical frameworks provides support for open borders if followed obediently to logical conclusion.¹⁴

But the claim that borders between states should be fully open is a controversial one, and there are plenty of philosophers who remain sceptical of the idea of open borders. Restrictions on migration have been defended on many different grounds, including communitarian and liberal egalitarian grounds. Michael Walzer, for example, argues from a communitarian perspective that without the right to control admission and exclusion ‘there could not be communities of character, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life’.¹⁵ David Miller outlines a similar argument claiming that ‘the public culture of their country is something that

Global Distributive Justice’, *Politics, Philosophy, and Economics*, 5 (2006), 97-127. For an enquiry on the ethics of migration from the perspective of the capability approach, see Mathias Risse, ‘Immigration, Ethics and the Capabilities Approach’, *Human Development Research Paper Series*, 34 (2009a), 1-58.

¹³ Carens, ‘Aliens and Citizens: The Case for Open Borders’, 252.

¹⁴ Ibid.

¹⁵ Michael Walzer, *Spheres of Justice – A Defence of Pluralism and Equality* (Oxford: Blackwell, 1983), 62.

people have an interest in controlling' and they want to be able to shape the values that are contained in the public culture. Miller argues that in general terms immigrants who enter a particular public culture have cultural and political values 'that are more or less different from the public culture of the community they enter'. As a consequence, the presence of immigrants will 'change the public culture in various ways'.¹⁶ This, on Miller's view, provides a justification for limiting flows of migrants between countries.¹⁷

Matthew Gibney, among others, holds that even if we accepted liberal egalitarian principles as universally valid, it does not directly validate a case for open immigration. He argues that liberal egalitarian principles require solidarity and trust among citizens, and that these relations 'are often sustained by a shared culture and can be jeopardized by large, short-term changes in membership'.¹⁸ Miller argues along similar lines that 'social justice will always be easier to achieve in states with strong national identities and without internal communal divisions'. He contends that countries like Belgium, Canada, and Switzerland can maintain social cooperation 'partly because they are not simply multinational, but have cultivated common national identities alongside communal ones'.¹⁹ Thomas Christiano approaches the issue of migration from the perspective of democratic institutions. He argues that immigration can be justifiably restricted if it undermines 'the trust, identification, or mutual understanding necessary to sustain the proper functioning of democratic institutions'.²⁰ Finally, some theorists have interpreted that states constitute associations, and have defended limitations on migration on the grounds of freedom of association. One such theorist is Brian Barry, who argues that there is a 'presumption in favour of asymmetry' in migration, and that 'it is a general

¹⁶ David Miller, 'Immigration: The Case for Limits', in Andrew I. Cohen and Christopher Heath Wellman (eds.), *Contemporary Debates in Applied Ethics* (Oxford: Blackwell, 2005), 199-200.

¹⁷ Ibid.

¹⁸ Matthew Gibney, 'Liberal Democratic States and Responsibilities to Refugees', *The American Political Science Review*, 93 (1999), 174.

¹⁹ David Miller, *On Nationality* (Oxford: Oxford University Press, 1995), 96.

²⁰ Thomas Christiano, 'Immigration, Political Community, and Cosmopolitanism', *San Diego Law Review*, 45 (2008), 958.

characteristic of associations that people are free to leave them but not free to join them'.²¹

In the current study, I will not offer a conclusive argument on how open borders should be all things considered. The current study provides only a limited argument on 'the moral right to asylum', and further controversies regarding open migration remain beyond its scope.²² The study focuses on examining how exactly the right to asylum can be grounded in morality, the scope of the persons with the right to asylum, questions regarding the institutionalisation of the right to asylum, and obligations in its protection.²³ For our current purposes it is enough to note that even if a conclusive case can be made for open borders a limited normative enquiry on asylum is not redundant. It can still be considered as outlining a 'non-ideal account' of justice. To accept this type of approach is to say that to be merely concerned with open borders is to 'aim too high' in terms of solutions and guidelines for reforming the existing global migration regime. Following Joseph Carens, it may be argued that this type of enquiry on the ethics of migration is 'attentive to the constraints which

²¹ Brian Barry, 'Quest for Consistency: A Sceptical View', in Brian Barry & Robert E. Goodin (eds.), *Free Movement – Ethical Issues in the Transnational Migration of People and of Money* (London: Harvester Wheatsheaf, 1992), 284. See also Christopher Heath Wellman, 'Immigration and Freedom of Association', *Ethics*, 119 (2008), 109-141.

²² This type of approach follows closely Amartya Sen's arguments on enquiries of justice. Amartya Sen claims, I believe rightly, that there is no need to establish a 'transcendental approach to justice' for the possibility of a moral enquiry that is concerned with 'more just' and 'less just' institutional arrangements. He claims that different ways of advancing justice or reducing existing manifest injustices demands only 'comparative judgments about justice', and for this the identification of fully just institutional arrangements 'is neither necessary nor sufficient'. Amartya Sen, 'What do We Want from a Theory of Justice', *The Journal of Philosophy*, 103 (2006), 216-217. Put differently, in order for us to be able to examine the existing 'refugee problem' as a question of justice it is not necessary to answer conclusively to the question whether open borders constitute a valid ideal or not. Instead, it is sufficient to consider whether a genuine moral right to asylum may be said to exist.

²³ Previously, the ethics of asylum policies have been considered in Walzer, *Spheres of Justice*, 45-51; Peter and Renata Singer, 'The Ethics of Refugee Policy', in Mark Gibney (ed.), *Open Borders? Closed Societies? The Ethical and Political Issues* (New York: Greenwood Press, 1988); Joseph Carens, 'States and Refugees: A Normative Analysis', in Howard Adelman (ed.), *Refugee Policy: Canada and the United States* (Toronto: York Lanes Press Ltd., 1991); 'Refugees and the Limits of Obligations', *Public Affairs Quarterly*, 6 (1992), 31-44; 'Realistic and Idealistic Approaches to the Ethics of Migration', *International Migration Review*, 30 (1996), 156-170; 'Who should get in? The Ethics of Immigration Admissions', *Ethics & International Affairs*, 17 (2003), 95-110; Matthew Gibney, *The Ethics and Politics of Asylum – Liberal Democracy and the Response to Refugees* (Cambridge: Cambridge University Press, 2004). Michael Dummett, *On Migration and Refugees* (London and New York: Routledge, 2001); Christina Boswell, *The Ethics of Refugee Policy* (Aldershot: Ashgate Publishing Ltd., 2005); David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), 224-227. Yet, so far there is no whole philosophical book fully dedicated to an enquiry on the moral right to asylum and its protection.

must be accepted if morality is to serve as an effective guide to action in the world in which we currently live'.²⁴

Of course, what is 'feasible' and what moral guidelines can constitute 'effective guide to action' in the current world is controversial.²⁵ But the intuitive difference between an enquiry on asylum and an enquiry on open borders should be clear enough. As Carens points out, 'no one would suppose that open borders (between all states, not just those of the affluent West) is a realistic policy option', so it may be asked why we should be 'wasting time on evaluating the hypothetical moral merits of such an approach'.²⁶ If it is correct that in the near future open borders amount to an unreachable ideal, it is meaningful to focus on a more restricted examination of justice and asylum. This type of approach to justice essentially outlines normative improvements to the current world. It focuses on 'moderate' advancements of justice, and the eradication of the most urgent injustices. Of course, if the ideal of open borders can be conclusively shown to be valid and to be realisable in the near future, so much the better for those seeking asylum. In the current study, however, the validity of the ideal remains bracketed.

The examination of the right to asylum is meaningful also for another reason. The right to asylum is formulated in one form in the Universal Declaration of Human Rights (UDHR) Article 14 (1), which states that 'everyone has the right to seek and to enjoy in other countries asylum from persecution'. It is well known that this right is a 'hollow' right with little practical weight, as no state has the legal obligation to grant asylum to any persons. It is meaningful to examine whether underlying this hollow manifesto right there can be argued to be a genuine moral right that can ground binding obligations of justice, and whether the possible underlying moral right has the same scope as the formulation outlined in the UDHR.²⁷ In more general

²⁴ Carens, 'Realistic and Idealistic Approaches to the Ethics of Migration', 156.

²⁵ For a thorough enquiry on the questions of feasibility in theories of global justice, see Dominik Zahrnt, *An Enquiry into The Effectiveness and Feasibility of Theories of Global Justice* (PhD Thesis, University of Edinburgh, 2010). Available online: <http://www.era.lib.ed.ac.uk/bitstream/1842/4112/1/Zahrnt2010.pdf> (accessed 19.07.2011).

²⁶ Carens, 'Realistic and Idealistic Approaches to the Ethics of Migration', 159.

²⁷ Following James Griffin, this type of approach to human rights may also be called the 'bottom-up' approach. On Griffin's view, a theorist taking the bottom-up approach examines the position that

terms, an enquiry on the moral right to asylum offers us one way to scrutinise critically the interstate framework of protection founded on the principle of sovereignty, and the existing practices that states engage in when they are attempting to avoid assisting destitute non-citizens who are seeking protection. The moral vindication of the existing state practices towards asylum seekers is dependent on what kind of claims asylum seekers have for protection. If it can be concluded that persons regardless of their background have a genuine moral right to asylum in certain circumstances, then we are in a better position to evaluate which state practices towards asylum seekers are condemnable and which practices are not. The right to asylum – if shown to be a genuine right – can generate binding obligations to treat the right-bearers in a particular way, and state practices that are not in congruence with these binding obligations are unjust and objectionable, and they should be revised.

It is important to recognise, however, that there is more than one way to conduct an enquiry on the moral right to asylum. This is centrally because the term ‘moral right’ can be understood in different ways. One way to examine the claims to asylum that persons have under certain circumstances of deprivation is by focusing on what may be called the ‘remedial right to asylum’, i.e., the right to asylum as a ‘special right’.²⁸ This approach examines the special claims to asylum that persons have due to failures of other agents to respect the negative duty not to harm.²⁹ The negative duty not to harm is often considered as the strongest kind of moral duty, and failure to comply with it can entail responsibilities of remedy.³⁰ An enquiry on the special

human rights have within the contextual political narrative, and ‘sees what higher principles one must resort to in order to explain their moral weight, when one thinks they have it, and to resolve conflicts between them’. See James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2009), 29.

²⁸ According to H.L.A. Hart, ‘special rights’ may be understood as rights that ‘arise out of special transactions between individuals or out of some special relationship in which they stand to each other’. H.L.A. Hart, ‘Are There any Natural Rights?’, in Paul Kelly (ed.), *British Political Theory in the Twentieth Century* (Malden: Blackwell Publishing, 2010), 161.

²⁹ On causality and responsibility in more general terms, see Miller, *National Responsibility and Global Justice*, ch. 4; H.L.A. Hart and Tony Honore *Causation in the Law* (Oxford: Clarendon Press, 1985), esp. ch. 3.

³⁰ Apart from past injustice, special claims can come into existence due to benefits agents receive from past injustice committed by other agents. On this issue more closely, see Norbert Anwander, ‘Contributing and Benefiting: Two Grounds for Duties to the Victims of Injustice’, *Ethics and International Affairs*, 19 (2005), 39-45; Miller, *National Responsibility and Global Justice*, 102-103; Daniel Butt, ‘On Benefiting from Injustice’, *Canadian Journal of Philosophy*, 37 (2007), 129-152.

right to asylum focuses on examining the chain of events that has led to an outcome X as well as the moral blame of agents in causing the outcome X. If agent A has caused a chain of events that leads outcome X to unfold, A may also have an obligation to remedy X if it constitutes harm to agent B.

In the context of individual remedial liability, it is often argued that the assignment of remedial responsibility does not necessarily require that harm be caused with intentional acts or omissions. Rather, on the liability view it is enough to show that when acting the agent 'should have known better'. Often cited examples are cases where a person sets a fire, and the fire eventually gets out of control and damages other person's property. Instead of intentional acts or omissions, the liability approach requires only that the agent should have been able to foresee the prospective destructive outcomes, and that the agent acted voluntarily.³¹

In the context of asylum, it might be examined for example whether certain deprived persons have a remedial right to be provided asylum in other states due to the fact that agents outside their home countries are imposing an oppressive global economic order on them.³² It might also be examined whether certain persons have a remedial right to asylum due to the fact that some states are selling weapons technology that is eventually used by the government of the persons' home state in persecution. As well, it might be examined whether some persons can have a remedial right to asylum due to the fact they are losing their livelihood because of pollution or climate change that can be traced back to other countries.

An enquiry on the remedial right to asylum is an important topic, as those who violate the negative duty of non-interference can have strong remedial responsibilities. In an enquiry on the remedial right to asylum, there are plenty of philosophical issues that require careful consideration. In the examination of the special right to asylum the causal links need to be clarified. In the end, the clarification of the causal links is not always an uncomplicated task. Often the causal

³¹ Miller, *National Responsibility and Global Justice*, 96.

³² See Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge: Polity Press, 2008), 118-122.

chains of events that have led to a particular outcome are extremely complex, and the strength of causal roles agents have in causing a particular harmful outcome may be hard to establish accurately.

In the examination of the special right to asylum it also needs to be shown what kind of moral responsibility the causally linked have to remedy a harmful outcome. This task can be a complex one especially when there are multiple agents causally linked to a harmful outcome. The initiating roles of agents and their relative authority, the strength of causal links, the effects of acts and omissions, the profits deriving to the causally linked agents, and the forms of profit derived need to be examined more closely when considering remedial responsibilities.³³ It needs to be shown how we should 'rank' different effects contributing to an outcome from the perspective of moral responsibility, i.e., what kind of responsibilities different agents have in remedying a harmful outcome they have contributed to when there are others who have also contributed to the same outcome in some other ways. To recognise these complexities is not to say that a comprehensive account of the special remedial right to asylum cannot be outlined. Instead, it is only to say that the task of outlining one is harder than it might appear at first sight.

An alternative way to approach the right to asylum is by examining whether all persons may be said to have a 'general right' to asylum, i.e., a right that persons have irrespective of their standing in the political communities they belong to.³⁴ On this approach, the right to asylum may be understood as a universal welfare claim that each person can have under certain circumstances of deprivation against the international community at large.³⁵ In the current enquiry, I will focus strictly on the vindication of the general right to asylum. More specifically, I will focus on the general right to asylum and on the corresponding duties of those with the capacity to

³³ See for example Joel Feinberg, 'Collective Responsibility', *The Journal of Philosophy*, 65 (1968), 684-685.

³⁴ On H.L.A. Hart's account, 'general rights' do not arise out of special relationships, but instead are 'rights which all men capable of choice have in the absence of those special conditions which give rise to special rights'. Hart, 'Are There any Natural Rights?', 164.

³⁵ Apart from the two approaches recognised here, Carens outlines also a third possible line of enquiry. This approach suggests that states can have an obligation to protect needy foreigners 'because the moral legitimacy of the state system depends on the provisions of some safe state membership to everyone'. Carens, 'States and Refugees: A Normative Analysis', 20.

assist the right-bearers. In the study I will not examine the remedial responsibilities of those agents who have contributed to a harmful outcome. There are two primary reasons for this framing.

Firstly, in many cases persons cannot rely on the protection of those particular agents who have remedial responsibilities due to the fact that they are violating their negative duty of non-interference. If asylum seekers are fully dependent on these agents' assistance, this means that many persons in need of asylum may be left fully without protection. For example, during the Second World War it would have been absurd for Polish Jews to attempt to seek asylum in Germany against the Nazi persecution of Jews. Those bearing moral responsibility for the assistance of asylum seekers due to their wrongdoings can be 'hostile actors' with little or no concern over the requirements of justice. Put differently, the agents primarily responsible can fail to comply with the remedial requirements of justice, and not always it can be possible to hold the non-compliers accountable.

Secondly, not in every case where a person faces severe harms can remedial liability be traced to an agent outside the person's home state. If members of one state have an obligation of justice to provide asylum to non-members only due to those members' past wrongdoings, persons facing strictly intra-communal severe harms will be fully dependent on the non-enforceable charitable actions of members in other states. For example, persons facing threats to their lives and liberty due to natural disasters or fully internal ideological conflicts to which no agents from outside are contributing remain outside the scope of persons with a special remedial claim to asylum.

1.2 The structure of the thesis and the central arguments

I will proceed with the enquiry in the following way. In chapters two and three I will focus on the theory of the moral right to asylum. In chapter two I will examine how the right to asylum can be grounded in morality. Firstly, I will examine an entitlement of justice to a minimally decent life in which basic needs are met regardless of the person's background community, i.e., a universal right to

necessities. Then, I will turn to examine the right to asylum more closely. The universal moral right to asylum is essentially a derivative right, and it derives its moral weight from the more fundamental right to necessities. More specifically, the right to asylum can be understood essentially as a claim for the protection of the right to necessities in other states when the right to necessities is not sufficiently protected in a person's home state.

What about the scope of persons with the right to asylum? Do all persons whose right to necessities is insufficiently protected in their home states have the right to asylum? I believe this is not the case. In the chapter I will claim that the scope of persons with the moral right to asylum is context-dependent, and that insufficient protection of the right to necessities does not directly entail that a person has the right to be granted asylum in other states. Whether a person has the right to asylum depends on the availability of instruments with which the person may be assisted by the international community when facing insufficient protection of the right to necessities in his or her home country. I will conclude that all persons whose right to necessities is insufficiently protected in their home countries have the right to asylum against the international community when they cannot be assisted with any other remedial instrument within a reasonable timeframe.

The claim that there is a general right to be assisted by the international community with the means of asylum is a controversial one to make. Some philosophers have strongly resisted the view that general rights to assistance that are against no agent in particular are genuine rights. Onora O'Neill is probably the most famous philosopher to outline this criticism against general rights to assistance. She contends that universal rights to assistance, which correspond to imperfect instead of perfect duties, are essentially 'manifesto rights against unspecified others', and they seem 'bitter mockery to the poor and needy, for whom these rights matter most'.³⁶

³⁶ Onora O'Neill, *Towards Justice and Virtue* (Cambridge: Cambridge University Press, 1996), 132-133; *Bounds of Justice* (Cambridge: Cambridge University Press, 2000), 125.

As the right to asylum is a general welfare right of citizens of all states against the international community at large, i.e., against no agent in particular, the validity of O'Neill's criticism needs to be considered. Is it the case that the right to asylum does not constitute a genuine right due to the fact that by its generic form it is a general welfare right? Chapter three will be dedicated to the vindication of the right to asylum from O'Neill's criticism. In the chapter I will suggest that there are several reasons why the criticism fails to undermine the right to asylum. To mention one, the right to asylum may be understood to function as a justificatory foundation for obligations to establish mediating institutions that distribute the responsibilities of protection in such a way that each right-bearer will eventually have a sufficiently secure access to the content of their right.

In the fourth chapter, I will turn to examine the existing refugee protective institutions and their moral dimension on the grounds of the theory outlined in chapters two and three. I will examine how the currently existing refugee protective institutions have emerged, what are their central characteristics, and by using the moral right to asylum as the standard of evaluation I will consider whether they should be restructured. Within the Westphalian framework of states there has emerged an international 'global refugee regime' that focuses on addressing the deprivations of a certain group of persons fleeing their home countries. The 1951 UN Convention Relating to the Status of Refugees and The Protocol may be said to constitute the central foundation of the global refugee regime. The Convention recognises that persons in certain circumstances are entitled to the status of refugee, and this status makes persons eligible for asylum. The Convention definition of refugee has not, however, been accepted unquestionably. There remains a vigorous debate on who exactly should be considered as refugees eligible for asylum, and many regional treaties have formulated broader definitions than the one outlined in the Convention. In the chapter I will claim that the 'prescriptive status of refugee', which renders a person eligible for asylum, should be established on the grounds of the moral right to asylum. Put differently, a global refugee regime is morally unsatisfactory unless it recognises that all persons with the right to asylum are eligible for asylum in other countries.

Another central element of the existing global refugee regime is that it recognises no binding obligation on states to grant asylum to any persons. In other words, the principle of sovereignty is overriding in the existing global refugee regime. The central mechanism of refugee protection in the global refugee regime is the *non-refoulement* principle, which sets certain minimum requirements on states against the expulsion of persons to the frontiers of other territories. I will argue that there are two central problems with maintaining the *non-refoulement* principle as the central mechanism of protection in a global refugee regime. Firstly, the *non-refoulement* principle does not recognise adequately that the moral right to asylum can ground binding positive duties of protection and the establishment of protective institutions that aim to guarantee a sufficiently secure access to the content of the right to asylum for each right-bearer. Secondly, it distributes burdens in the protection of the right to asylum centrally in accordance to proximity to humanitarian crises instead of considerations of justice.

In chapter five, I will examine the institutionalisation of the right to asylum in more specific terms. If the existing global institutional framework is morally unsatisfactory, what should be done with it? What kind of institutions should be established to replace the existing institutions? In the chapter, I will focus on vindicating a particular institutional proposal from moral criticism that has been outlined against it. The policy proposal examined more closely is called the tradable quota scheme. The tradable quota scheme is a policy proposal suggesting that each state capable of protecting bearers of the right to asylum is assigned a proportional accommodation quota which can be traded in an assigned market place with other states after the initial allocation.

Three separate lines of moral criticism have been outlined against the tradable quota scheme. These criticisms suggest that the tradable quota scheme includes internal components that are morally objectionable, and that it should be abandoned for other forms of burden-sharing schemes. The first claim is that the tradable quota scheme is inconsiderate of the desires of those right-bearers who are accommodated into a

particular country, the second claim is that the scheme should be abandoned as it violates the dignity of those who are traded between countries, and the last that the scheme leads to exploitation of the developing countries by the more developed countries. I will examine these moral objections more closely, and claim that either the objections fail or the more specific implemented scheme may be structured in such a way that it accommodates the concerns that are raised in the objections. In other words, the tradable quota scheme may be vindicated from the moral criticism that has been outlined against it.

In chapter six, I will turn to examine the obligations of protecting the right to asylum in circumstances of partial compliance. Citizens of all states with the capacity to assist bearers of the right to asylum may be said to share the responsibility in protecting the right-bearers. But what should states do in their efforts to discharge their citizens' duties when some states wrongfully decide against bearing their 'fair share' of the collective burden? Are the complying states obligated to 'take up the slack' and assist the right-bearers the non-complying states fail to assist? It surely constitutes an injustice that the complying states will have to bear the non-complying states' burdens. Yet, I will offer several reasons why the injustice should not be passed on to the right-bearers. Finally, I will conclude the study by examining the stringency of obligations in the protection of the right to asylum. I will suggest that we should consider the obligations of assistance on the complying states to be at the very least moderately stringent regardless of the compliance and non-compliance of other states.

2. Grounding the right to asylum in morality

In the current chapter, I will outline an account of the moral right to asylum. The chapter is divided into three sections. In the first section, I will focus on examining a universal entitlement of justice to a minimally decent life, i.e., a life in which basic needs are met. This entitlement, which I will call the universal right to necessities, constitutes a moral foundation for the right to asylum. In the second section, I examine the possibility of circumstances under which the right to necessities remains insufficiently protected in persons' home countries. As I will point out, states can fail to protect their citizens' right to necessities sufficiently either due to non-compliance or unfavourable conditions. In the third section, I will link the right to asylum to the more fundamental right to necessities. I will suggest that the moral right to asylum should be understood as a derivative right, and that it is essentially a right for the protection of the right to necessities in other states. More specifically, I will conclude that all persons whose right to necessities is insufficiently protected in their home states due to non-compliance or unfavourable conditions have the right to asylum when they cannot be assisted with other remedial instruments by the international community within a reasonable timeframe.

2.1 The right to necessities

In the current section, I will outline a moral foundation for the right to asylum. The foundation presented here will be called 'the universal right to necessities'. The right to necessities can be understood as an entitlement of each person to a decent life in which basic needs are met. The concept of basic needs has been prominently present in debates on the measuring unit of human development. It has been introduced as a candidate to replace the problematic GNP.³⁷ The concept of basic needs has also received close attention from a broad range of theorists who work on human rights and global justice. Among others, for example David Miller, Peter Jones, Gillian Brock, James Nickel, Frances Stewart, David Wiggins, Paul Streeten, Bill Wringe

³⁷ See for example Frances Stewart 'Basic Needs, Capabilities, and Human Development, in Avner Offer (ed.), *In Pursuit of the Quality of Life* (Oxford: Oxford University Press, 1996).

and Len Doyal have seen a close justificatory relationship between basic needs and basic human rights.³⁸

But as philosophers working on the idea of basic needs have noticed, the task of outlining a universal moral entitlement to the satisfaction of basic needs is not an uncomplicated one. Apart from having to forge a bridge between naturalistic characteristics of humanity and morality, for such a task to be successful there is a requirement to clarify the nature of basic needs, i.e., it needs to be shown what exactly are basic needs, and why they are morally weighty considerations. Brian Barry criticises need-based justifications of distributive policies, claiming that ‘need’ is not by itself a justificatory principle at all. He claims that whenever someone says ‘x is needed’ it can always be asked about the purpose it is needed for. On Barry’s view, ‘no statement to the effect that x is necessary in order to produce y provides a reason for doing x. Before it can provide such a reason y must be shown to be (or taken to be) a desirable end to pursue.’ He concludes that ‘need’ can be used in conjunction with justifications of any kind, but not by itself’.³⁹

David Miller, among others, argues against this conclusion, and suggests that ‘intrinsic needs’, which are separable from needs that are strictly instrumental, do in fact provide an independent justificatory foundation for distributive policies. He argues that while logically speaking intrinsic needs are still similar to statements regarding instrumental needs in that they are in the form ‘A needs x in order to do y’, what is needed is not merely a means to an end, but rather what appears means is

³⁸ See David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), ch. 7; Peter Jones, *Rights* (London: MacMillan, 1994), ch. 7; Gillian Brock, *Global Justice – A Cosmopolitan Account* (Oxford: Oxford University Press, 2009), 63-72. James Nickel, ‘Poverty and Rights’, *The Philosophical Quarterly*, 55 (2005), 386-402; Frances Stewart, ‘Basic Needs Strategies, Human Rights, and the Right to Development’, *Human Rights Quarterly*, 11 (1989), 347-374; David Wiggins, ‘What is the Force of the Claim That One Needs Something?’, in Gillian Brock (ed.), *Necessary Goods – Our Responsibilities to Meet Others’ Needs* (Lanham: Rowman & Littlefield, 1998), 44-46; Paul Streeten, ‘Basic Needs and Human Rights’, *World Development*, 8 (1980), 107-111; Bill Wringe, ‘Needs, Rights, and Collective Obligation’, in Soran Reader (ed.), *The Philosophy of Need* (Cambridge: Cambridge University Press, 2005), 191-192; Len Doyal, ‘A Theory of Human Need’, in Gillian Brock (ed.), *Necessary Goods – Our Responsibilities to Meet Others’ Needs* (Lanham: Rowman & Littlefield, 1998), 164-168.

³⁹ Brian Barry, *Political Argument* (Berkeley and Los Angeles: University of California Press, 1965), 47-49.

really a central part of an end.⁴⁰ On Miller's view, needing 'is not a psychological state, but rather a condition which is ascribed "objectively" to the person who is its subject'.⁴¹ This aspect of objectivity in needs is recognised also by David Wiggins: 'what I need depends not on thought or the workings of my mind (or not only on these) but on the way the world is. Again, if someone wants something because it is F, one believes or suspects that it is F. But if one needs something because it is F, it must really be F, whether or not one believes that it is.'⁴²

But are there grounds to support the conclusion that it is possible to outline an objective account of basic needs? What exactly does it mean to have a 'need' that is culture-independent and fundamental? If it is the case that needs are fully dependent on their cultural understanding, this proves to be detrimental to a universal account of basic needs as well as to our attempt to ground the right to asylum on it. In the end, an enquiry on needs does not have to accept cultural objections at face value.⁴³ It can take a critical view on cultures, and it can examine them not only through the lens of cultural anthropology, but also through the lenses of human physiology, psychology, and the philosophy of good life.

As for example some writers on women's rights have rightly argued, we should be strongly sceptical of fully culturally relative understandings of needs. Martha Nussbaum gives an example of how deprived women have adapted their conceptions of needs to the surrounding circumstances. She cites a poll on widowers and widows in India, which suggests that while the widowers, on the one hand, were full of complaints about their health status, the widows, on the other hand, ranked in most cases their health status as 'good'. But this explicated perception on health,

⁴⁰ David Miller, *Social Justice* (Oxford: Clarendon Press, 1976), 128.

⁴¹ Miller, *Social Justice*, 129.

⁴² David Wiggins 'Claims of Need', in Ted Honderich (ed.), *Morality and Objectivity* (London: Routledge, 1985), 152-153. Very similar argument is outlined for example by Barbara Schmitz, according to whom basic needs are of an objective nature, and they can be distinguished from wants, desires, and preferences, all of which she considers to be essentially subjective states of the mind. Barbara Schmitz, 'How to Derive Claims of Justice from Needs' (unpublished). Available online: http://www.hd-ca.org/pubs/5_2_schmitz.pdf. (accessed 11.08.2011), 3.

⁴³ See for example Martha Nussbaum, 'Human Functioning and Social Justice: In Defence of Aristotelian Essentialism', *Political Theory*, 20 (1992), 202-246; Susan Okin, 'Mistresses of Their Own Destiny: Group Rights, Gender, and Realistic Rights of Exit', *Ethics*, 112 (2002), 218-219.

according to Nussbaum, hid a crude reality. The eventual medical examination showed that the widows were in fact suffering far more than the widowers from diseases associated with nutritional deficiency. Nussbaum suggests that as the women had lived all their lives expecting that women will eat less, the weakened health status produced in this way was second nature to them. She concludes that 'the poor and deprived frequently adjust their expectations and aspirations to the low level of life they have known'.⁴⁴

This rejection of cultural objections has merit. As dominant groups in a culture may effectively repress the voices of the worst-off and can resort to cultural repression and manipulation, many of the weaker members of cultures can adapt their expectations to their surroundings and disregard their actual needs. Cultures may be structured in such a way that they systematically require great sacrifice from some members (for example women) for the community's 'collective causes', and those members bearing the burdens of the sacrifice can be pressured into accepting cultural roles and denying that they have a genuine objectively definable need that is contradicting the collectively desired aim. Cultures are powerful collective forces, and they can lead persons to deny that they need things that actually are necessary for basic human functioning, e.g., the need for certain minimum amount of daily calories, water, and non-toxic environment. Individuals' personal opinions regarding their needs are malleable, and victims can develop perverse sympathy and understanding towards their oppressors.

A cross-cultural approach to basic needs can focus on what is universally necessary for humans to lead minimally adequate lives. Some things may be argued to be of universal value in that they are fundamental for the pursuit of goals altogether. When persons are lacking these fundamentally important things, they may be said to be suffering severe harm. It is a culturally independent fact that men and women need to be able to use certain capacities to achieve whatever comprehensive moral doctrines or life plans they set for themselves and aim to pursue.⁴⁵ Put differently, the basic

⁴⁴ Nussbaum, 'Human Functioning and Social Justice', 230.

⁴⁵ David Miller, 'Justice and Global Inequality', in Andrew Hurrell and Ngaire Woods (eds.), *Inequality, Globalization, and World Politics* (Oxford: Oxford University Press, 1999), 198.

needs approach may be understood as being close to Alan Gewirth's arguments according to which freedom and well-being are essential for any purposive human agency.⁴⁶ There are some fundamental human needs the satisfaction of which constitute precondition for the very possibility of moral agency, and not meeting them can be considered to constitute universally severe harms to any life plan.⁴⁷

But where exactly is the more specific threshold of basic needs? In circumstances of abundant resources and peaceful coexistence it seems fairly unproblematic to conclude whether or not basic human needs are sufficiently satisfied. If a society has an accessible effective health care system and a free education system for all, its members are not only adequately nourished but are also enjoying gourmet foods, and they are able to live extensively in accordance with their inner beliefs, it seems fairly evident that basic needs in that society are met.⁴⁸ Conversely, basic needs are clearly not met for many in a poor society where a high proportion of the people face violent untimely death or die at early age from easily curable diseases. To give a practical example, it might be said that while the basic needs of the Swedish are generally met, the basic needs of the people in Angola clearly are not. Swedish currently have an average life expectancy of 78 years, policing institutions that effectively provide security to the general population, broad freedom of religion, and extensive welfare system that provides a safety net throughout the citizens' lives. In turn, Angolans have a life expectancy of 38 years, no safety net to speak of, and a dysfunctional civil society that has been severely damaged by conflicts.

What can clarify the threshold of basic needs further is that with basic needs we are not concerned with the ability to live a 'full life', or a 'good life', or a 'flourishing

⁴⁶ On the connection between Gewirth's philosophy and needs, see Raymond Plant, *Modern Political Thought* (Oxford: Basic Blackwell, 1991), 203-213.

⁴⁷ To have a basic need for X is to suffer severe harm when lacking X. According to Garret Thomson, 'a fundamental need for X is itself inescapable in the sense that the fact that X is causally necessary for not suffering serious harm cannot be altered. The causal link is inescapable.' Garrett Thomson, 'Fundamental Needs', in Soran Reader (ed.), *The Philosophy of Need* (Cambridge: Cambridge University Press, 2005), 177. The same is not necessarily the case for example with desires. Desires change with social circumstances, and a person may rid oneself of them without necessarily having to bear severe harm as a consequence. The link between severe harm to a person and desire-satisfaction is contingent, and depends primarily on whether the desire represents a basic need or not.

⁴⁸ Stewart, 'Basic Needs Strategies, Human Rights, and the Right to Development', 351.

life' in any particular society. A person living a flourishing life is living a life in which she can develop and exercise those capacities that are for her the most important ones. To flourish is to thrive within a certain specific conception of human excellence. The satisfaction of basic needs, in turn, constitutes only a minimal foundation for the pursuit of a flourishing human life and does not guarantee it.⁴⁹

More specifically, there are two general categories of basic needs that may be recognised. The first category includes bodily needs that constitute a necessary requirement for human *existence*. These needs are tied to physical necessities. To be human is to have a human body, and to have a human body is to be vulnerable to certain things existing in the world.⁵⁰ At the very least the lack of clean water, food, sanitation, shelter, and basic health are each by their general characteristics such that they can, if sufficiently severe, infringe upon tolerable human existence independent of one's background culture.⁵¹ But maintaining bodily functions is not all there is to *human* existence. In addition to physical necessities, there are also other necessities that may be recognised to be of fundamental importance independently of a person's background culture. In order for a person to be living a minimally decent life a person requires at least such things as freedom from torture and physical and mental violence, physical security, basic education, and an adequate measure of freedom of movement, freedom of conscience, and freedom of expression.⁵²

Accounts of global justice that defend a universal human entitlement of justice to circumstances where persons have sufficiently secure access to the satisfaction of basic needs have been outlined by cosmopolitan theorists like Gillian Brock as well

⁴⁹ Miller, *National Responsibility and Global Justice*, 181.

⁵⁰ Gillian Brock suggests that to assess physical health we can use for example measures of life expectancy, mortality rates at specific ages, the prevalence of developmental deficiencies among children, and calorific consumption compared to WHO requirements. In turn, to assess for example physical security it is possible to use such indicators as statistical data on homicide rates, and the percentages of people who are victims of war or state violence. Brock, *Global Justice*, 67. See also Miller, *Global Justice and National Responsibility*, 184.

⁵¹ Each of these sources of deprivation is also recognised by UNHCR as a reason due to which an individual may be 'forcibly displaced'. UNHCR, Global Trends 2008, 3. Available online: <http://www.unhcr.org/4a375c426.html> (accessed 19.07.11).

⁵² It should be pointed out that even if one endorses a broader or narrower account of basic needs than the account outlined here, one can still appreciate the following argument regarding the right to asylum in a formal sense.

as liberal nationalists such as David Miller.⁵³ Brock argues that all persons would endorse a universal entitlement to basic needs behind the ‘veil of ignorance’, and claims that ‘whatever governing structures we endorse would (at a minimum) have as the central part of their mandate to ensure that people are so positioned that meeting their basic needs is within their reach [...]’.⁵⁴ In turn, Miller claims that ‘basic needs appear to have the kind of moral urgency that we look for in a justification of human rights’.⁵⁵ Basic needs are of universal value due to the fact that these needs are not directly tied to any comprehensive doctrines, and morally weighty because their satisfaction is a central precondition for existence of a moral agent.⁵⁶ In other words, basic needs are universally morally urgent things that can reasonably be argued to ground duties of justice in other agents.⁵⁷ These duties can be duties of respect, duties of assistance, or indirect duties, which can be understood as positive ‘duties to create, maintain, and enhance institutions that directly fulfil rights’.⁵⁸ Following Jeremy Waldron, it may be argued that basic needs amount to ‘a normative resource base from which a whole array of moral requirements can be developed’.⁵⁹ In the current work I will call this normative resource base ‘the right to necessities’.

Before turning to examine more closely how the right to asylum is linked to the universal right to necessities, there are four issues regarding the universal right to necessities I wish to consider more closely. Firstly, the range of human rights included in the right to necessities is, in the end, narrower than the lists of rights outlined in the central international human rights conventions. The basic needs approach offers an account of ‘basic human rights’, and some of the human rights

⁵³ Brock, *Global Justice*, ch. 3; Miller, *National Responsibility and Global Justice*, ch. 7.

⁵⁴ Brock, *Global Justice*, 53. On the veil of ignorance see John Rawls, *A Theory of Justice* (Harvard: Harvard University Press, 1999a), 118-123.

⁵⁵ Miller, *National Responsibility and Global Justice*, 185.

⁵⁶ In the words of David Miller: ‘my recognition of others as human beings like myself implies that I have a duty to safeguard them against conditions which would unavoidably blight their lives’. I have a duty to ‘refrain from disabling X or to feed X when he is starving, because I must recognise disablement and starvation as conditions that impair any human life I can conceive of’. Miller, ‘Justice and Global Inequality’, 200.

⁵⁷ Schmitz, ‘How to Derive Claims of Justice from Needs’, 3.

⁵⁸ On indirect duties see Henry Shue, ‘Mediating Duties’, *Ethics*, 98 (1988), 696.

⁵⁹ Jeremy Waldron, *Liberal Rights – Collected Papers 1981-1991* (Cambridge: Cambridge University Press, 1993), 213.

recognised in the international human rights documents do not have a sufficiently close connection to basic needs to qualify to the final list of basic human rights. To give an example, aspirational human rights that aim to promote well-being beyond basic human needs are excluded from the right to necessities. Among these are Article 12 of the International Covenant on Economic, Social, and Cultural Rights, which outlines a right to 'the enjoyment of the highest attainable standard of physical and mental health', UDHR Article 24 outlining a right to 'periodic holidays with pay', and Article 27 on the right 'to enjoy the arts and to share in scientific advancement and its benefits'.⁶⁰ In short, while the basic needs approach offers a justificatory foundation for a range of basic human rights it does not provide a justification to 'non-basic human rights' and 'aspirational human rights'.

Secondly, it needs to be pointed out that the universal right to necessities I have outlined here is a controversial one. The universal right to necessities is effectively a bundle of more specific human rights comprising not only claims to non-interference (universal liberty rights), but also claims to certain goods that may be necessary for the satisfaction of a person's basic needs (universal welfare rights). But not all philosophers have accepted that there can be general rights such as the right to necessities due to the fact that it imposes more than strict requirements of forbearance on other human agents. Onora O'Neill, for example, argues that universal rights to goods and services that are against unspecified others do not constitute genuine rights. On her view, a right cannot be a genuine right unless it is possible to identify who exactly is to blame when a right-bearer does not receive what he or she is due.⁶¹ For the time being, I will refrain from examining this controversy regarding the universal right to necessities more closely. This is centrally because I will focus on O'Neill's criticism in the next chapter where I examine it in the context of the right to asylum. As the right to asylum may be considered as a

⁶⁰ This is not to say, however, that aspirational rights cannot necessarily be considered to have some kind of universal moral force. The possibility of aspirational entitlements beyond the right to necessities is bracketed in the current enquiry. The argument here strictly suggests that the basic needs approach does not offer a justificatory foundation for all human rights outlined in the central human rights conventions.

⁶¹ See Onora O'Neill, *Towards Justice and Virtue* (Cambridge: Cambridge University Press, 1996), 129.

universal right to assistance, not only the right to necessities but also the right to asylum needs to be vindicated from O'Neill's criticism.

Thirdly, the real capacities of humans to assist others do, of course, fluctuate, and this fluctuation can provide an excuse for a particular duty-bearer's omission in the protection of the right to necessities. But as Jeremy Waldron rightly points out, the shortage of resources to protect a right does not by itself make the right disappear.⁶² More precisely, it does not make the general relationship of obligations between duty-bearers and those with valid claims to disappear. Scarcity is an issue of discharging duties, and it is separable from the recognition of claims that are sufficiently weighty to ground obligations of justice in others.

Finally, a person having basic need X does not directly mean that the person has a human right to the satisfaction of that need. There are two central reasons why this is not the case. Firstly, there cannot be obligations of justice to satisfy a person's basic need if the efforts require harming the basic needs of other agents. In other words, separateness of persons has to be taken into account when establishing the final scope of basic needs that matter from the perspective of justice. In the words of David Miller, 'before a need can ground a right, we have to know that the proposed right would not impose obligations on others that would necessarily violate their own human rights'.⁶³ Secondly, persons may only have a claim to the satisfaction of those basic needs that can possibly be satisfied by other humans. If severe harm that a person is facing is of such nature that there exists no remedy, there cannot be duties of justice on any agent to provide that particular remedy to the person.⁶⁴

2.2 Insufficient protection of the right to necessities

So far I have examined the universal right to necessities. In this section, I will turn to examine the protection of the right to necessities, or rather its failure, more closely. A closer examination of the institutional arrangements dedicated to the protection of the

⁶² Waldron, *Liberal Rights*, 215.

⁶³ Miller, *National Responsibility and Global Justice*, 188.

⁶⁴ Miller, *National Responsibility and Global Justice*, 186.

universal right to necessities is important for our current purposes, as it allows us to understand better the nature of the right to asylum.

States may be considered as jurisdictional institutional units that have a central instrumental role in the protection of the right to necessities. More precisely, states constitute political institutions that, among other things, aim to ensure that their members have secure access to the content of the right to necessities. As Simon Caney points out, it is meaningful to speak about the state within the framework of cosmopolitan moral theory. He contends that 'an egalitarian cosmopolitan can, and should, recognise the instrumental importance of political institutions, including the state'. A cosmopolitan theory of justice that focuses on persons' universal entitlements and duties can recognise that 'the state has normative significance for people's duties to uphold these rights'. Caney notes that 'one might adhere to cosmopolitan principles of distributive justice, including perhaps fairly egalitarian ones, but also hold that as a member of the state one is under a special duty to uphold the cosmopolitan entitlements of one's fellow citizens.'⁶⁵ Put differently, the state may be seen as an institutional scheme of cooperation between its members, and as a member of this institutional scheme a person can have 'special duties' of justice towards other members of the scheme to ensure that they receive their cosmopolitan entitlements and 'general duties' of justice to ensure that members of other states receive their cosmopolitan entitlements.⁶⁶

Miller outlines a similar argument regarding the protection of basic human rights.⁶⁷ He contends that 'the members of each political community bear a special responsibility to ensure that rights are secured within the community'. Miller notes that 'there is nothing mysterious in the idea that rights which are universally held should generate obligations that fall in the first instance on particular people: every child has a right to a secure home, but it is the child's parents that bear primary

⁶⁵ Simon Caney, 'Global Distributive Justice and the State', *Political Studies*, 56 (2008a), 511.

⁶⁶ Caney, 'Global Distributive Justice and the State', 512.

⁶⁷ It should be pointed out that Miller holds there to be more than instrumental reasons for why the responsibility in the protection of rights can fall on particular agents. He notes that special responsibilities do not exist merely due to 'convenient division of labour, but reflects the fact that the strength of interpersonal obligations depends on the ties that bind the two parties concerned'. Miller, 'Justice and Global Inequality', 200.

responsibility for securing this right'. He concludes that 'it is only when the parents are unable to meet their obligation are third parties required to step in to fill the breach'.⁶⁸

The sad reality is, of course, that we do not have to move far away from the domain of ideal theory to recognise the genuine possibility that not all states will protect sufficiently their citizens' right to necessities.⁶⁹ In other words, the very institution that is supposed to protect persons' universal entitlement to basic needs can be incapable of functioning in an adequate way. In fact, a look around the existing reality allows us to conclude fairly quickly that a world in which all members of all states have their right to necessities sufficiently protected in their home states is a distant utopian dream. There are, of course, countless more specific reasons why a person's right to necessities may be insufficiently protected in a person's home state. Two general categories of reasons can be distinguished here. Following John Rawls' argument in *The Law of Peoples*, it can be claimed that circumstances of rights protection may fall short of the ideal either due to non-compliance or due to unfavourable conditions.⁷⁰ Let us consider each of these possible scenarios, starting with non-compliance.

A particular government of a state can be non-compliant with the requirements of justice in two centrally different ways. The paradigmatic state failure to protect citizens' universal entitlements is active violation of these entitlements. A government can either draft unjust laws that authorise the violations of persons' universal entitlements, or it can draft laws requiring official respect of entitlements but nevertheless in practice fail to comply with the existing laws. The government of

⁶⁸ Ibid.

⁶⁹ It is important to emphasise here that the question is about 'sufficiently secure' rather than 'fully secure' access to the content of the right to necessities. Whether I walk to the neighbourhood supermarket, cross the road, or go out in the city at 2 am, there is a certain threat that for some unforeseeable reason my general well-being will fall below the threshold of basic needs. There is only so much that is reasonable to expect in the protection of the right to necessities. In the words of Andrew Shacknove, 'even in a well-ordered society, insecurity will persist'. Andrew Shacknove, 'Who is a Refugee?', *Ethics*, 95 (1985), 278.

⁷⁰ See also Rawls' account of full compliance and partial compliance in *A Theory of Justice*. Rawls suggests that his theory concerns the structuring of a 'well-ordered society', i.e., it focuses on how a society should organise its basic structure under the conditions of full compliance. Rawls, *A Theory of Justice*, 7-8.

a state can be corrupt and malevolent, and regardless of the existing laws it can actively use the state apparatus for example to persecute a particular group of citizens.

Thomas Pogge rightly notes that there is something especially hideous, outrageous, and sinister about a government actively violating citizens' fundamental rights. When a government is actively violating citizens' rights, 'such wrongs do not merely deprive their victims of the objects of their rights but attack those very rights themselves: they do not merely subvert what is right, but the very idea of right and justice'.⁷¹ In some states active government violations of the right to necessities constitutes a real problem for minority groups. In the existing world states are not ethnically or religiously homogenous, and a particular group governing the state can be hostile to other groups within the state. The actions of Iraq's government against the Kurd minority in the 1980's and early 1990's provide a clear example of this form of harm that can occur in non-ideal circumstances. In the case of the Kurds, the government of Iraq engaged in the persecution of ethnic Kurds in northern Iraq and deprived many of them of their basic needs and violated their right to necessities.

Apart from directly depriving citizens of their basic needs, a government can also fail to comply with the requirements of justice by intentionally not protecting the right to necessities when it has sufficient capacities to do so. In other words, a government may stop short of actively using state institutions to harm the citizens, but it may nevertheless be unwilling to sufficiently protect them against deprivations of basic needs by non-state agents. For example, a government that does not actively persecute homosexuals can still have an institutionalised discriminatory bias against homosexuals in the protective institutions of the state. The protective institutions of the state may turn a blind eye when other citizens of the state or foreign nationals with hostile attitudes deprive homosexual citizens of their basic needs, and these institutions can also fail to hold the rights violators accountable for their actions. When the protective institutions of a state systematically fail to intervene in

⁷¹ Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge: Polity Press, 2008), 65.

deprivations of some of its citizens' basic need, and when the state institutions systematically fail to hold accountable the violations of the citizens' right to necessities, the state may no longer be said to represent the victims.

The second broader set of reasons why a state may fail to satisfactorily function as the political institution primarily responsible for the protection of the right to necessities is unfavourable conditions. While a government of a state may not be unwilling to protect its citizens' right to necessities, it can still be unable to provide protection. This type of failure to protect the right to necessities is distinctly different from the set of reasons examined above. When a government actively violates its citizens' right to necessities or condones right violations by non-state agents, the 'protective bond' between the state and the right-bearing citizens subjected to severe harms is severed. In such cases the government is behaving malevolently against the citizens by failing to do morally required things that are within the limits of its capacities. In turn, in unfavourable conditions the protective bond between the state and the right-bearers still remains intact. The government remains well-intentioned towards the right-bearing citizens, but regardless of its best efforts it is simply incapable of sufficiently protecting some of the citizens' right to necessities.

There are, of course, a myriad of reasons why a state may be faced with social and economic circumstances under which it is extremely difficult if not impossible to sufficiently protect the right to necessities. One possible reason is that the territory on which the state is located has inadequate natural resources to maintain well-functioning state institutions.⁷² But even if we leave aside the issue of distribution of natural resources between territorial states, there are still several other reasons due to which unfavourable conditions can emerge within a state. A state can, for example, face extreme natural disasters, and as a consequence the government of the state can lose its effective capacity to protect the citizens' rights. Natural disasters can destroy state infrastructure, manufacturing capacities, and they can hinder food production below critical levels. As well, a state can have such a political culture, political

⁷² For a seminal argument on justice and the distribution of natural resources, see Charles Beitz, 'Justice and International Relations', *Philosophy & Public Affairs*, 4 (1975), 366-373.

virtues, and civil society that they paralyse the state and lead to some of the citizens being deprived of their basic needs.⁷³ In the words of Rawls, states facing unfavourable conditions can ‘lack the political and cultural traditions, the human capital and know-how, and often the material and technological resources needed to be well-ordered’.⁷⁴ Under unfavourable conditions it can be impossible for a government to maintain well-functioning state institutions, and the state can become effectively paralysed.⁷⁵ The state may attempt to do everything in its power to protect its citizens, but the surrounding conditions can be such that even the best attempts prove to be insufficient.

2.3 What does it mean to have the right to asylum?

When a citizen of one state does not have a sufficiently secure access to the content of the right to necessities in his or her home state, it does not follow that the right ceases to exist as a consequence. Universal entitlements do not disappear immediately when one institutional arrangement dedicated to their protection fails to function adequately.⁷⁶ On the contrary, the insufficiently secure access to the content of the right to necessities suggests centrally that the existing political institutions dedicated to the protection of the right to necessities should be restructured and/or additional supportive institutions should be established where reasonably practicable. All agents with the capacity to assist share a responsibility in protecting the right to necessities, and the failure of one state to protect right-bearers can entail that citizens in other states with capacity to assist are obligated by justice to step in and assist. Put differently, the right to necessities is a universal entitlement which can ground duties of justice not only in compatriots (who are primarily responsible for the protection of

⁷³ In practice, it can of course be complicated to pinpoint exactly to what degree the right to necessities is insufficiently protected due to non-compliance and due to unfavourable conditions. As Matthew Price rightly points out, ‘outlaw elements may exist within burdened societies. Indeed, one way for a society to be burdened is that, despite its best efforts, it is unable to control these outlaw elements’. Matthew E. Price, *Rethinking Asylum: History, Purpose, and Limits* (Cambridge: Cambridge University Press, 2009), 72-73. See also Rawls, *The Law of Peoples*, 109.

⁷⁴ Rawls, *The Law of Peoples*, 106.

⁷⁵ This paralysis may be either temporary, or it can be the long-term state of affairs. Unfavourable conditions can lead to persons having insufficiently secure access to the content of their right to necessities for decades to come, or they can lead to temporary lack of protection that can be addressed within weeks or months.

⁷⁶ Rawls outlines a similar argument in the *Law of Peoples*. He contends that ‘in the society of the Law of Peoples the duty of assistance holds until all societies have achieved just liberal or decent basic institutions’. Rawls, *The Law of Peoples*, 118.

each others' right to necessities), but also in the citizens of other states (who are secondarily responsible for the protection of other states' citizens' right to necessities).⁷⁷

All things considered the political structuring of the world should be such that it can provide all bearers of the right to necessities a sufficiently secure access to the right's content when reasonably practicable. If the state-based division of labour fails to adequately realise the right to necessities to all persons, there is a need to establish additional interstate arrangements that advance this aim. The 'asylum' system can be understood as a secondary institutional system that is dedicated to protecting those whose right to necessities is insufficiently protected in their home states. Obviously there would be no need to establish and maintain a comprehensive interstate institutional regime dedicated to offer persons asylum in states other than their home state were we living in a world in which the requirements of ideal justice were realised in each person's home state, and were we to be living in such a world for the foreseeable future. Such circumstances would render the interstate asylum system redundant.⁷⁸ Put differently, an interstate regime dedicated to offering asylum may be understood as a back-up system for protecting the right to necessities, and it serves to complement the primary institutional system of protection, i.e., the system where states protect their citizens' rights.

The right to asylum can be understood as a claim to be provided with protection of basic need in states other than a person's home state, and it receives its normative force from the more fundamental right to necessities. Put differently, the right to

⁷⁷ Many philosophers have outlined a distinction between primarily responsible and secondarily responsible duty-bearers. For example, Robert E. Goodin argues that those who are secondarily responsible can retain responsibilities when agents who are primarily responsible fail to discharge their duties sufficiently. He gives an example of a father who fails to act in saving his own child from drowning, and argues that 'onlookers cannot excuse their own failure to do so with the plea that it was his job, not theirs'. Robert E. Goodin, *Protecting the Vulnerable – A Reanalysis of Our Social Responsibilities* (Chicago: The University of Chicago Press, 1985), 134-135. On the distinction, see also Leif Wenar, 'Responsibility and Severe Poverty', in Thomas Pogge (ed.), *Freedom from Poverty as a Human Right – Who Owes what to the Very Poor?* (Oxford: Oxford University Press, 2007), 263-266.

⁷⁸ As Joseph Carens rightly points out, once we are looking at the issue of asylum we are concerned about 'exceptional' cases, i.e., ones 'that cannot be handled by the normal institutional arrangements under which each state looks out for its own'. Joseph Carens, 'Refugees and the Limits of Obligations', *Public Affairs Quarterly*, 6 (1992), 37.

asylum is effectively a right to be provided access to the jurisdictional territory of states other than a person's home state and to have one's right to necessities protected by these states. The right to asylum is not self-standing in terms of its moral grounding, but instead it is a derivative right that relies on underlying normative concepts. It is only because the right to necessities has universal normative force that there can be a universal right to asylum. If it were the case that the right to necessities was not by its scope a universal right but instead a societal right, we could not speak of a universal moral right to asylum. The right to asylum becomes relevant strictly when a state serving as a mediating institution in the protection of the right to necessities fails to function satisfactorily. To seek asylum is essentially to assert that the state primarily responsible has failed – for one reason or another – to adequately fulfil its responsibilities in protecting the right to necessities. In other words, the right to asylum may be considered as something akin to an international version of the UDHR Article 8 stating that 'everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'.⁷⁹

At this point it may be asked why exactly should we be considering the right to asylum and the establishment of a secondary institutional system of protecting the right to necessities at all? After all, asylum may be understood to constitute a second-best mechanism for protecting the right to necessities.⁸⁰ Accessing asylum involves physical relocation of persons to territories under the jurisdiction of states other than the persons' home state, and admittedly it would be better if bearers of the right to necessities would not have to relocate in order to gain a sufficiently secure access to the content of their right. Put differently, the circumstances under which persons gain access to the content of the right to necessities with the help of the right to asylum are in themselves something that should be avoided with institutional arrangements

⁷⁹ James Hathaway suggests that a 'refugee regime' should not be understood primarily as 'an immigration system; it rather establishes a situation-specific human rights remedy'. James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005), 1000.

⁸⁰ The theory of the second-best has its roots in welfare economics. In welfare economics approach to the theory of second-best, 'there is admitted at least one constraint additional to the ones existing in Paretian optimum theory and it is in the nature of this constraint that it prevents the satisfaction of at least one of the Paretian optimum conditions'. See Richard G. Lipsey and Kelvin Lancaster, 'The General Theory of Second Best', *The Review of Economic Studies*, 24 (1956), 12.

when reasonably practicable. But the recognition of asylum as the second-best solution to the protection of the right to necessities does not entail that it is not meaningful to focus on the right to asylum and secondary institutional arrangements. The rationale for focusing on the second-best mechanism is twofold.

Firstly, we are far from a world in which we could concern ourselves strictly with best possible solutions with regard to the protection of the right to necessities. The real world does not only produce expectable outcomes; on the contrary, our world often surprises us with unexpected circumstances. To be concerned about the right to asylum and about setting up a global asylum system that functions between states is to accept the real foreseeable possibility that the right to necessities will not be sufficiently protected for every person by their home state, and that in some circumstances it is only the second-best mechanism of protection that can offer meaningful access to the content of fundamental rights. While a system where persons' home states are the only institutions from which they can seek protection for their right to necessities may be sufficient for ideal circumstances, we do not have to move far from ideal circumstances to recognise that states do not necessarily function as they should. Not all states necessarily comply adequately with the requirements of justice, and even if they do unfavourable conditions can still emerge unexpectedly.

Secondly, the establishment of a global asylum system is important due to the urgency of the needs in question. Real persons are faced with real deprivations of their basic needs. While for a philosopher whose basic needs are not at stake the second-best mechanism for protecting the right to necessities may be only of secondary importance, it is far from evident that this is the case also for those who are genuinely faced with severe harms and have no meaningful opportunity to pursue a decent life.⁸¹ Those persons who do not have a sufficiently secure access to the

⁸¹ While from a philosophical standpoint it may be true that the questions regarding the satisfaction of basic needs with mechanisms other than second-best remedial mechanisms are 'prior' questions of justice, it is not evident that they necessarily constitute 'primary' questions of justice. The question regarding the right to asylum can be understood to constitute an additional element of a more comprehensive theory of justice that takes into consideration the contingency of circumstances. Put differently, an account of justice that includes an analysis of the right to asylum and the global refugee

content of the right to necessities are primarily interested in gaining it, and only secondarily interested in whether the secured access constitutes the best or the second-best solution.

What about the scope of persons with the right to asylum? Do all persons whose right to necessities is insufficiently protected in their home states have the right to asylum against the international community? I believe in the end this is not the case. The right to asylum may be understood as an instance of a more general right to be assisted by the international community. In other words, only a specific subgroup of persons who have the claim to be assisted by the international community when their right to necessities is insufficiently protected in their home states has the right to asylum. Whether a person has the right to asylum or the more general right to be assisted by the international community depends on the specific context in which the state has failed to protect its citizens' right to necessities sufficiently. On this approach, the form of the claim to assistance against the international community is dependent on the range of remedial instruments available. The international community has a broad range of remedial instruments with which it can attempt to address the insufficient protection of the right to necessities. Apart from securing access to asylum, the international community may attempt to provide remedy to the insufficient protection of the right to necessities in a person's home state for example by engaging in a military campaign to dismiss a malevolent government from power, by imposing economic and diplomatic sanctions on a government of the state, or by offering economic aid.⁸² If the insufficient protection of the right to necessities can be addressed effectively by the international community with remedial instruments other than asylum within a reasonable timeframe in the right bearer's home state, then it seems unreasonable for the right-bearer to claim that he or she has the right to be granted asylum in other states.

regime recognises the principled possibility of non-ideal circumstances, and it integrates this possibility into the broader theory of justice.

⁸² For an excellent recent enquiry on the justification of humanitarian intervention see James Pattison, *Humanitarian Intervention and the Responsibility to Protect - Who Should Intervene?* (Oxford: Oxford University Press, 2010), esp. ch. 1. and ch. 3. For a thorough philosophical analysis on humanitarian aid, see Garrett Cullity, *The Moral Demands of Affluence* (Oxford: Oxford University Press, 2004), ch. 3.

To give an example, a country may be facing unfavourable conditions due to an earthquake, and there can be many citizens who do not have sufficiently secure access to the content of their right to necessities for the foreseeable future regardless of the remedial measures taken by the government. In this type of scenario the government has systematically failed to protect the right to necessities despite its best efforts, i.e., due to unfavourable conditions. Once the government has failed to fulfil its responsibilities, the international community has the obligation of justice to assist the victims of the earthquake. But if the international community can provide remedy to the insufficient protection of the right to necessities effectively and within a reasonable timeframe with economic and other forms of aid, the victims of the earthquake cannot claim that they have the right to asylum in other countries. In the current case, the earthquake victims should rather be considered to have a more general right to be assisted by the international community with one of the available remedial instruments. This is not to say that the international community is not allowed to offer remedy to the bearers of the right to necessities in the form of asylum. Instead, it is only to say that the persons whose right to necessities is insufficiently protected in their home state do not in the current case have a claim to asylum against the international community.

In some circumstances, however, there may be only one remedial instrument that can satisfactorily address the insufficient protection of the right to necessities within a reasonable timeframe. For example, diplomatic and economic sanctions can be ineffective in assisting members of a minority group who are facing an urgent threat of persecution from the government of their home state, and there may not be a justification for humanitarian intervention due to the fact that the campaign's prospect of success is relatively low and due to the fact that the possibility of actively-caused severe harm to other citizens of the state is relatively high. In these kinds of circumstances it seems reasonable to suggest that the deprived bearers of the right to necessities have a claim for the use of specific remedial instrument. Put differently, under circumstances where asylum constitutes the only remedial instrument that can address the insufficient protection of the right to necessities in such a manner that desirable results are reached within a reasonable timeframe it

may be argued that the deprived bearers of the right to necessities have the right to asylum against the international community rather than the more general right to be assisted.

The availability of alternative remedial instruments is a central factor in determining the final scope of persons with the right to asylum, and for establishing what remedial instruments are available for the use of the international community the contextual circumstances of deprivation need to be considered more closely. In other words, when considering the range of persons who have the right to asylum we should be focusing on the *need* for asylum rather than on the *reasons* why a person's right to necessities is insufficiently protected in the person's home state. So where exactly does this observation leave us regarding the scope of persons with the right to asylum? Is it the case that nothing can be said about the persons with the right to asylum in more general terms? The fact that the eligibility of persons for asylum is determined contextually does not mean that a general conclusion remains fully beyond our reach. In the end, the following can be concluded regarding the scope of persons with the right to asylum: all persons whose right to necessities is insufficiently protected in their home state have the right to asylum – rather than the more general right to be assisted – when they cannot be assisted with other remedial instruments by the international community within a reasonable timeframe.

Then the question becomes, what can we make of this general conclusion? If the above conclusion is correct, it entails that the scope of persons with the right to asylum is on the one hand narrower than on David Miller's and Michael Dummett's accounts, and on the other hand broader than the scope of persons recognised in the Universal Declaration of Human Rights (UDHR) Article 14 outlining a human right to asylum.⁸³ Let us start with Miller's and Dummett's accounts. In his account of

⁸³ The scope of persons with the right to asylum is also narrower than the scope of persons recognised in Andrew Shacknove's famous descriptive account of the concept of refugee. Shacknove suggests that we should consider as refugees 'persons whose basic needs are unprotected by their country of origin, who have no remaining recourse other than to seek international restitution of their needs, and who are so situated that international assistance is possible'. Shacknove, 'Who is a Refugee?', 277. The fact that persons' basic needs are unprotected by their home country and that they do not have any other remaining recourse than to seek international restitution does not necessarily entail that the

refugee protection Miller holds, similarly to the current view, that there is a direct link between the idea of basic needs and the moral right to asylum. Miller essentially suggests that the right to asylum is a derivative right for the protection of basic needs in other countries, and argues that citizens of other states have an obligation to protect persons whose basic human rights are being violated or threatened in their current place of residence. Miller expands from the traditional view of refugee protection, as he argues that a person can have the right to be protected in other states not only in cases of well-founded fear of persecution, but also in cases where they are being deprived for example of their right to subsistence or right to basic health care. According to Miller, when a person whose basic human rights are threatened ‘applies to be admitted to a state that is able to guarantee her such rights, then *prima facie* the state in question has an obligation to let her in’. Those with a claim to asylum are owed by other states the opportunity for a decent life.⁸⁴

In turn, Michael Dummett claims in his criticism of existing asylum practices, which recognise only persons with a well-founded fear of persecution to be eligible for asylum, that ‘all conditions that deny someone the ability to live where he is in minimal conditions for a decent human life ought to be grounds for claiming refuge elsewhere’.⁸⁵ But if the previous conclusion is correct, and the scope of the persons with the right to asylum is context-dependent, i.e., it depends centrally on whether persons can be effectively assisted in their home countries with other remedial instruments than asylum within a reasonable timeframe, then the accounts of the right to asylum outlined by Miller and Dummett are both excessively broad. Both accounts suggest that once a person’s basic human rights are insufficiently protected in his or her home state, the person immediately has the right to asylum. This interpretation excessively stretches the scope of persons with the right to asylum, and overlooks the fact that in some circumstances the international community can have

international community does not have several means available for addressing the insufficient protection of basic needs.

⁸⁴ David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), 225-227. It should be noted, however, that in his recent unpublished writings Miller has moved away from the formulation he outlines in *National Responsibility and Global Justice*, and he seems to have outlined an account of the right to asylum that is fairly similar to the one presented in the current study.

⁸⁵ Michael Dummett, *On Migration and Refugees* (London and New York: Routledge, 2001), 37.

a choice over the remedial instrument it applies when remedying the occurring deprivations. Once it becomes obvious that there are multiple remedial instruments available to the international community each of which can effectively address the occurring deprivations within a reasonable timeframe, the bearers of basic human rights cannot respond with moral indignation when they are provided assistance with means other than asylum. Their claim is not for the choice of remedial instruments with which they are assisted, but rather for ‘a’ sufficiently secure access to the content of their rights under circumstances which their home state has failed to offer them adequate protection.

Article 14 (1) of the UDHR, in turn, states that all persons have ‘the right to seek and to enjoy in other countries asylum from persecution’. In other words, Article 14 recognises ‘persecution’ as a necessary condition for a person to be eligible for asylum. The concept of persecution may be understood to comprise a set of reasons due to which a person faces deprivations. In the 14th Century usage, the term persecution referred to ‘oppression for the holding of a belief or opinion’, and the Oxford English Dictionary defines persecution as ‘hostility and ill-treatment, especially because of race or political or religious beliefs’. The treatment of early Christians in the Roman Empire is often offered as a categorical example of persecution, and the same term is often used to describe the treatment of Mennonites, Hutterites, and Huguenots in early modern Europe.

The term persecution clearly denotes something that is harmful to a person. More precisely, the term denotes relationships between persons in which at least one of the persons is subjected to harm. When A persecutes B, there may be said to exist a relationship of harm between the two. In the relationship A is the persecutor and B is the persecuted. Persecution essentially denotes an extreme concept, and comprises treatment of a person that goes beyond unfair treatment.⁸⁶ The threshold of severity

⁸⁶ As for example David A. Martin notes, while abuse such as the violation of the right to live in the city one prefers thoroughly deserves a condemnation, by itself it is not severe enough to constitute persecution. David A. Martin, ‘The Refugee Concept’, in Howard Adelman (ed.), *Refugee Policy – Canada and the United States* (Toronto: York Lanes Press Ltd, 1991), 41. Satvinder Singh Juss points out similarly that an important prerequisite for a violation of a person’s human rights to amount to

may be understood as being located ‘somewhere between ‘threats to life or freedom’ on the one hand, and ‘mere harassment and annoyance’ on the other hand’.⁸⁷ One way to understand the circumstances of persecution better is through the idea of basic needs. On this approach to persecution, it is a necessary condition for persecution to occur that a person faces deprivations of his or her basic needs. When a person does not face harm that targets his or her basic needs, but instead only harm that targets desires, wants, or societal needs, there may be discrimination or intimidation involved, but no persecution.⁸⁸

Another important element of a persecutory relationship is the commitment of the persecutors to cause a drastic change in their victims’ lives.⁸⁹ Nazis were not indifferent about whether or not their victims faced severe harms or not, and the same was the case with the Roman authorities during the so-called ‘Diocletian persecution’ of Christians. For the Nazis the aim was to systematically eradicate certain ‘inferior’ groups altogether, and for the Roman emperors the aim was to punish Christians for practicing an outlaw religion. Persecutors are especially committed and devoted in their efforts towards the persecuted. There can, of course, be a broad range of reasons why a person may be persecuted. It may be due to their

persecution is that the violation ‘must reach a certain degree of severity’. Satvinder Singh Juss, *International Migration and Global Justice* (Aldershot: Ashgate, 2006), 204.

⁸⁷ See Matthew E. Price, *Rethinking Asylum: History, Purpose, and Limits* (Cambridge: Cambridge University Press, 2009), 107.

⁸⁸ For example, a neighbour walking past a person’s house every morning and giving the middle finger surely constitutes a nuisance and can even intimidate, but it seems excessive to claim that the occurring harm is sufficiently severe for it amounts to persecution.

⁸⁹ But is it a necessary condition of persecution that there is an intention to inflict severe harm? I believe this does not have to be the case. It seems enough for persecution to occur that there is a strong commitment on the part of the persecutor to have a profound impact on the victims’ lives. Persecutors may be under the false belief that they are doing the right thing, and that instead of causing severe harm they are actually helping or saving their victims. Historically many persecutors have considered that they are assisting their victims rather than inflicting severe harms on them. According to Ronald Christenson, even Augustine outlines in his writings an account suggesting that it is in the best interest of some persons to be persecuted. Augustine suggests that ‘fear will not change a man from evil, but it will serve as a warning and compel him to examine the truth’ that is the word of God. For Augustine, there is such a thing as ‘righteous persecution’. This form of persecution aims to religious conversion, and is something that should be ‘undertaken only reluctantly, and pursued in a spirit of love, like a parent who finds that he must punish a child’. Augustine’s idea of righteous persecution may be understood as paternalistic acts of persons that aim through punishment to make persons realise what is in their best interest all things considered. The aim of righteous persecution is not death and eradication of persons, but rather to deliver the persons in unity with the Church with the help of terror. Ronald Christenson, ‘The Political Theory of Persecution: Augustine and Hobbes’, *Midwest Journal of Political Science*, 12 (1968), 425-426.

political opinions such as secessionist ideas, or it may be due to their ethnic background, religious beliefs, gender, or sexual orientation. It may be because they hold vital information, or even because of the shape of their noses. The more specific reasons for persecution are countless. But persecutors are not indifferent about whether or not they have an impact on the person's life they are subjecting to severe harm.⁹⁰ On the contrary, they take close interest in their victims and have a strong will to cause a drastic change in the victims' lives.

In short, persecution may be understood as a 'special harm' that certain persons face. There are intentional agents who are deeply dedicated to systematically inflicting severe harm to their victims. The persecuted are 'haunted' by others with devotion, and they are in urgent need of assistance. The persecuted may be said to be like 'The Hounded Woman' in Joseph Raz's example escaping a fierce carnivorous animal. 'Her mental stamina, her intellectual ingenuity, her will power and her physical resources are taxed to their limits by her struggle to remain alive. She never has a chance to do or even to think of anything other than how to escape from the beast.'⁹¹

But even if we accept the claim that persecution constitutes a 'special harm' requiring urgent response from the international community, it is still not the case that only the persecuted can have the moral right to asylum. We can imagine drastic conditions within a state which are not the result of persecution, and which cannot be remedied effectively within a reasonable timeframe by the international community with any other means than asylum. Civil war, generalised violence, natural disaster, and famine are non-persecution related reasons for insufficient protection of the right

⁹⁰ One additional element of persecution is discrimination. A government of a state can, for example, systematically deprive its citizenry of basic needs by resorting to what might be called 'kleptocratic economic policies'. But while many deprivations of the citizenry can amount to violations of the right to necessities, it is questionable that all such actions by the government can be called persecution. The government may, for example, systematically stop short of using the incoming tax revenue to protect the right to basic health care, and instead allocate the revenue to fund the leaders' luxurious lifestyles and to further solidify their position in power. While in the process the government may be said to violate the citizens' basic rights, it seems questionable whether these violations can be called persecution. The central reason why I believe in the current example we should not call the government actions persecution is because the government does not single out any persons or groups for mistreatment; it mistreats the citizenry with more or less 'equal concern'. See Price, *Rethinking Asylum*, 133-134.

⁹¹ Joseph Raz, *Morality of Freedom* (Oxford: Clarendon Press, 1986), 374.

to necessities that can in certain circumstances be addressed effectively only with relocation to other countries.

Climate change offers one real-world example of non-persecution related circumstances in which asylum offers the only effective means of remedying the occurring deprivations of basic needs. Climate change subjects millions of citizens in poor countries to severe harms.⁹² The harms that are inflicted through climate change may be in some cases so severe and prolonged that the governments of countries become systematically unable to fulfil the basic duties of protection owed to their citizens.⁹³ Such threat exists for example for the island states of Kiribati and Tuvalu. These states are currently facing rising sea levels that threaten their very existence and therefore their citizens' right to necessities.⁹⁴ The examples of Tuvalu and Kiribati represent cases where persons can be considered to have the right to asylum against the international community rather than the more general right to be assisted. Sanctions, development assistance, or humanitarian intervention each may have a remedial function in certain circumstances, but in the current context they are useless. The only meaningful instrument with which the occurring harms can be

⁹² As Simon Caney points out, it is the poor in developing countries who will predominantly feel the ill effects of global climate change. He argues that the global poor tend to earn their living in ways that are more exposed to the ill effects of global climate change, and they are also more at risk from such diseases as malaria and cholera. As well, the global poor are not as able as the citizens of the wealthy countries to adapt to the health-threatening and life-threatening effects of global climate change. Simon Caney, 'Cosmopolitan Justice, Rights and Global Climate Change', *Canadian Journal of Law and Jurisprudence*, 19 (2006), 257-258.

⁹³ Here, I will bracket the question regarding the cause of climate change. As the question here is about a general right against those with capacities to assist, there is no need to argue in defence of anthropogenic climate change. It can be pointed out, however, that even if we accepted the argument that the occurring climate change is anthropogenic, and that some human agents on the other side of the world are violating the right to necessities of the citizens of these island states and continue to refuse to reduce their carbon emissions to a level that is morally required, these actions hardly amount to persecution. One reason why this is the case is because most persons contributing to climate change have no intention to affect others' lives. For a defence of the claim that anthropogenic climate change can violate persons' human rights, see Caney, 'Cosmopolitan Justice, Rights and Global Climate Change', 259-264; 'Human Rights, Climate Change, and Discounting', *Environmental Politics*, 17 (2008b), 538-539; 'Human Rights, Responsibilities, and Climate Change', in Charles R. Beitz & Robert E. Goodin (eds.), *Global Basic Rights* (Oxford: Oxford University Press, 2009), 229-233.

⁹⁴ Jon Barnett & Neil Adger argue that the increased extreme weather events are severe enough to potentially undermine the atoll countries' national sovereignty and make the islands uninhabitable. See Jon Barnett and Neil W. Adger, 'Climate Dangers and Atoll Countries', *Climate Change*, 61 (2003), 328. See also Caney, 'Cosmopolitan Justice, Rights and Global Climate Change', 260.

remedied is asylum.⁹⁵ Rising sea levels threaten the existence of the states, and migration to territories of other states is necessary for addressing the occurring threat.

The UDHR formulation of the right to asylum is unsatisfactory because it recognises an excessively narrow range of reasons due to which a person may have a claim to be provided asylum by the international community. Rather than accepting as necessary conditions a predetermined range of reasons why deprivations occur, we should look at the need for assistance and the available remedial instruments when considering who exactly are the persons who have the claim to asylum against the international community. Climate change as well as many other non-persecution related reasons can lead to the occurrence of circumstances where asylum in other states offers the only meaningful remedy persons whose right to necessities is insufficiently protected in their home countries. Of course, it might be easier to distinguish bearers of the right to asylum from other prospective migrants if there was a clear predetermined range of reasons due to which a person may be considered to have the right to asylum. But this reason does not provide sufficient grounds for settling for a 'reason-based account' of the moral right to asylum. To settle for a reason-based account of the moral right to asylum is to overlook the possibility of unforeseeable circumstances beyond the accepted range of reasons due to which a bearer of the right to necessities can be in need of asylum. While accepting this possibility may be inconvenient from the more practical perspective of protecting the bearers of the right to asylum, I believe it would be intellectually dishonest to do otherwise.

⁹⁵ There are, of course, questions about whether the citizens of Kiribati and Tuvalu are entitled to more than simply asylum in other states, i.e., do the citizens of the island states have the right to a delineated exclusive territory on which they can be self-determinate? For our current purposes, it is enough to note that they have 'at the very least' the right to asylum. On the moral dimensions of the relocation of the island nations such as Kiribati and Tuvalu, see Mathias Risse, 'The Right to Relocation: Disappearing Island Nations and Common Ownership of the Earth', *Ethics and International Affairs*, 23 (2009b), 281-300; Sujatha Byravan & Sudhir Cella Rajan, 'The Ethical Implications of Sea-Level Rise due to Climate Change', *Ethics & International Affairs*, 24 (2010), 239-260; Cara Nine, 'Ecological Refugees, States Borders, and the Lockean Proviso', *Journal of Applied Philosophy*, 27 (2010), 359-375.

Conclusion

In the current chapter, I have outlined an account of the right to asylum. I claimed that the right to asylum has normative force because of the universal scope of the right to necessities. The right to asylum is effectively a right to secondary protection of the right to necessities by the international community in states other than a person's home state. States, which constitute the political institutions that are primarily responsible for protecting their members' right to necessities, do not always function adequately, and there can be a need for the international community to assist a state in the protection of the right to necessities or take over the protection efforts altogether. The right to asylum is a right to a specific form of assistance against the international community, and it differs from the more general right to be assisted. I concluded the chapter by examining the scope of persons with the right to asylum, and claimed that all persons whose right to necessities is insufficiently protected in their home states have the right to asylum when they cannot be assisted with other remedial instruments by the international community within a reasonable timeframe.

3. Is the moral right to asylum a genuine right?

In the previous chapter I examined the moral right to asylum, and argued that by its generic form the right to asylum is a welfare right against the international community at large. But if this is so, it entails that the right to asylum is against no agent in particular. Then the question becomes, if the right to asylum is against no agent in particular, can it be said to be a meaningful right in the first place? Some philosophers, such as Onora O'Neill, hold that universal rights to assistance, i.e., general welfare rights that are against no agent in particular cannot constitute genuine rights. In the current chapter, I will focus on examining the validity of this objection. I will proceed with the enquiry in the following way. I start by examining the distinction between imperfect and perfect duties, as it constitutes the central foundation for the criticism outlined by O'Neill. Next, I will examine O'Neill's criticism in more detail, and suggest three separate ways to respond to it. Finally, I will consider whether there are guidelines that can assist us in the institutionalisation of the right to asylum.

3.1 Perfect and imperfect duties

Let us start with the distinction between perfect and imperfect duties. The distinction emerged in the writings of early modern natural law theorists, and the first known theorist to refer to it is Hugo Grotius.⁹⁶ In the following centuries many philosophers, including John Stuart Mill and Immanuel Kant, have used the distinction to explain how there can be duties that differ from each other. In the last chapter of *Utilitarianism* Mill argues that 'duties of perfect obligation are those duties in virtue of which a correlative right resides in some person or persons; duties of imperfect obligation are those moral obligations which do not give birth to any right'.⁹⁷ While Mill's account clarifies how the distinction is often used in moral enquiries, it does

⁹⁶ Grotius makes a distinction between 'perfect right' and 'imperfect obligation of charity'. He writes in the following way of the latter: 'As the imperfect obligation of charity, and other virtues of the same kind are not cognizable in a court of justice, so neither can the performance of them be compelled by force of arms. For it is not the moral nature of a duty that can enforce its fulfilment, but there must be some legal right in one of the parties to exact the obligation. For the moral obligation receives an additional weight from such a right.' Hugo Grotius, *On the Law of war and Peace* (Whitefish: Kessinger publishing, 2004), 214 (II.XXII.xvi)

⁹⁷ John Stuart Mill, *Utilitarianism* (London: Longmans, Green, Reader, and Dyer, 1867), 74.

not tell the whole story. Many philosophers have set forth more as well as less stringent overlapping accounts of perfect and imperfect duties. To exemplify the plurality of interpretations, George Rainbolt outlines eight different formulations of the distinction, including Kant's, Pufendorf's, and Mill's. He notes that Kant alone articulates three formulations of the distinction, and Mill two formulations.⁹⁸ While there is no general consensus on what exactly the distinction is supposed to represent, there nevertheless seem to be some distinguishable core characteristics that can be said to constitute the general structure of each category. Next, I will outline preliminary accounts of the structure of both perfect and imperfect duties.

3.1.1 Perfect duties: a preliminary account

Two core characteristics may be recognised in universal perfect duties, the first being specified performance. Perfect duties include an identification of a specified performance, either action or forbearance, which is required to successfully discharge the duty. A common example of a universal perfect duty is the duty not to interfere with others' physical integrity. The duty not to interfere with others' physical integrity identifies a specified performance required from each duty-bearer: non-interference. The universal duty not to interfere with others' physical integrity also specifies the time when the performance should take place; the duty binds regardless of time and place.⁹⁹ Apart from universal perfect duties there can also be special perfect duties. By their form, special perfect duties may be either negative duties or positive duties. Keeping a promise is often given as an example of a special perfect duty. The act of promising, which follows the universal maxim 'one should always keep one's promises', constitutes a special relationship between specified agents. In the case of special perfect duties, a specified performance is required to discharge the duty, and the content of the duty specifies also when the performance is required. This action may be positive or negative by its form. In short, regardless of whether perfect duties take the form of universal or special duties, perfect duties specify the required performances by the duty-bearers.

⁹⁸ George Rainbolt, 'Perfect and Imperfect Obligations', *Philosophical Studies*, 98 (2000), 233.

⁹⁹ On how determinate duties specify the required action and occasion, see for example Violetta Igneski, 'Perfect and Imperfect Duties of Aid', *Social Theory and Practice*, 32 (2006), 447-450.

The second characteristic of perfect duties is the identification of a specified recipient. Perfect duties not only require specific performances from a duty-bearer, but also that the duties are discharged by the duty-bearer to specified recipients. Put differently, a perfect duty intrinsically identifies the agents to whom the duty-bearers are obligated to discharge their duties. The duties of non-interference are discharged by each duty-bearer simultaneously to all existing recipients. If I have a duty not to violate all other persons' physical integrity, what is required from me is that I simultaneously refrain from interfering the physical integrity of every single person. In a similar fashion, the duties of keeping a promise are discharged to the particular recipient(s) specified in the content of the promise. To sum up our short enquiry, the two characteristics of universal perfect duties suggest the following formulation: universal perfect duties bind all individuals at all times, and all recipients can simultaneously enjoy the output when a particular agent discharges his or her universal perfect duties. In turn, special perfect duties come into existence with special relationships, they bind all agents in the existing special relationships, and the content of the duty specifies how, to whom, when, and where the duty should be discharged.

3.1.2 Imperfect duties: a preliminary account

Imperfect duties are more complex by their generic structure than perfect duties in either of its two senses. These duties are often considered as universal duties, although some theorists note that there can also be imperfect special duties.¹⁰⁰ I will leave this category of duties unexamined, as it is not relevant for the purposes of the present enquiry. There are many formulations of universal imperfect duties, and it is not evident that all principles of imperfect duty can be subsumed under the same core characteristics. Kant, for example, recognises imperfect duties of self-improvement towards oneself, and duties of love, respect, and beneficence towards others.¹⁰¹ Here, I will focus solely on imperfect duties to assist others.

¹⁰⁰ Onora O'Neill, *Towards Justice and Virtue* (Cambridge: Cambridge University Press, 1996), 152.

¹⁰¹ For an interpretation of Kant's account of perfect and imperfect duties, see Thomas E. Hill Jr., 'Kant on Imperfect Duty and Supererogation', *Kant-Studien*, 62 (1971), 55-76. For an insightful analysis of Kant's imperfect duties of beneficence in the context of global justice debate, see Kok-Chor Tan, 'Kantian Ethics and Global Justice', *Social Theory and Practice*, 23 (1997), 54-58.

Imperfect duties constitute a moral category that is separable from ‘non-duties’ in that these duties require agents to make binding moral commitments. Imperfect duties are, after all, duties and therefore stand apart from supererogatory acts. Unlike supererogation, imperfect duties do not require that we behave like saints and heroes and engage in abnormally risky meritorious actions.¹⁰² Supererogatory acts may be considered to ‘extend beyond duties’, and a failure to engage in supererogatory acts does not result in moral condemnation. But a failure to discharge imperfect duties does bring about moral condemnation. While imperfect duties differ from supererogatory acts, they are also separable from perfect duties in that intrinsically their binding is looser in many senses than the binding in perfect duties. While a universal perfect duty requires individuals to comply with the duty everywhere and at all times, the intrinsic requirements in universal imperfect duties are not specific to the same degree. As the word ‘imperfect’ suggests, by their form these duties are somehow ‘incomplete’.

While there is no general consensus among philosophers on the idea of incompleteness in the context of imperfect duties, the idea of ‘latitude’ may nevertheless be said to be a close approximation of it. Latitude in imperfect duties can be understood to consist of 1) indeterminate action, 2) indeterminate occasion, and 3) indeterminate recipient. One of the ways in which imperfect duties are incomplete is that they give leeway to the duty-bearer on the actions with which the duty is eventually discharged. Contrary to the universal duty of non-interference, which specifies the exact required act, the general duty to assist others does not intrinsically specify the particular actions that ought to be performed to successfully discharge the duty. There is a broad range of ways to satisfy the requirements of positive duties to aid the needy.

This does not mean, however, that agents fully lack guidelines on how to discharge their imperfect duties. Firstly, the scope of ways in which imperfect duties may be discharged is intrinsically limited by perfect duties. For example, the universal duty

¹⁰² Joel Feinberg, ‘The Moral and Legal Responsibility of the Bad Samaritan’, *Criminal Justice Ethics*, 3 (1984), 64.

of non-interference constitutes limitations on the way in which the duty of beneficence may be discharged. Secondly, given that imperfect duties of beneficence correspond to a range of morally desirable outcomes, some actions advance the desirable outcomes whereas other actions are harmful for their realisation. Giving food to a hungry person or giving her farming equipment surely helps her with countering a food shortage, whereas pouring liquid mercury into her farmland does nothing to help her with her well-being. But what imperfect duties lack are more specific guidelines. Imperfect duties do not intrinsically specify the required action as does the universal duty of non-interference.

The second characteristic of latitude is the indeterminate occasion on which each duty-bearer is obligated to discharge his or her duties of assistance. Imperfect duties do not intrinsically specify whether I should discharge my duties tomorrow or next week. Kant's account of the duty of beneficence provides an example. On Kant's understanding, it is our 'duty to promote the happiness of others sometimes and that, accordingly, one may avoid doing so at any time (though not at all times) that one feels inclined'.¹⁰³ The latitude of occasion should not, however, be understood as releasing the duty-bearer fully from discharging the duty. As was noted already, unlike supererogation, imperfect duties morally bind individuals to discharge their duties towards the needy. If I never give aid to the needy, I am surely violating my imperfect duties. Finally, imperfect duties do not include a specification of the exact agents to whom the duties should be discharged. While universal perfect duties can be discharged simultaneously to all agents, this is not the case with imperfect duties. There can be more needy persons than a duty-bearer has capacities to assist, and for a duty-bearer to discharge imperfect duties of assistance it is only a requirement that the person assists some of the needy. Discharging imperfect duties is tied to limited capacities of positive action and the physical reality of being in one place at a time, and there is nothing in the structure of the imperfect duty that identifies a special relationship between a particular duty-bearer and a particular recipient. In other

¹⁰³ Liam Murphy points out that if we accept Kant's maxim of beneficence, this essentially entails that it is forbidden for a person 'to adopt a maxim of indifference to the welfare of others [...] but few minor acts of beneficence from time to time would seem to be enough to re-establish her good name'. Liam Murphy, *Moral Demands in Nonideal Theory* (Oxford: Oxford University Press, 2000), 71-72.

words, the internal structure of imperfect duties leaves the following question unanswered: to which particular recipient duty-bearers should discharge their duties? To sum up, the generic structure of imperfect duties of assistance suggests that duty-bearers ought to discharge their duties in accordance with the following maxim: discharge duties of assistance to some needy, somehow, and sometimes.

3.2 O'Neill on the genuineness of moral rights

Now, let us turn to O'Neill's criticism which, if valid, may be said to undermine not only the idea of the right to necessities but also the general right to asylum. O'Neill argues that there exists an asymmetry between 'universal welfare rights' and 'universal liberty rights'. On her view, universal welfare rights are rights to assistance, and universal liberty rights are rights that require only omission from duty-bearers. O'Neill claims that there exists an asymmetry between the two categories of rights because only universal liberty rights are 'claimable'. She argues that there are two central conditions for claimability: 1) it is possible to identify the responsible duty-bearers when a right is violated or is not fulfilled, and 2) the right must constitute a claim for a particular determinate performance. If these two conditions are not met, the right in question may not be considered claimable.

O'Neill argues that as by their form universal liberty rights correspond to perfect duties, they satisfy the conditions of claimability whether or not specific institutions for protecting rights have been established.¹⁰⁴ The duties corresponding to a universal liberty right can be discharged by a duty-bearer simultaneously to all right-bearers, as there are no positive actions of assistance required from the duty-bearer. For example, a duty-bearer can at least in principle abstain from interfering simultaneously with all bearers of the right not to be subjected to bodily harm in the world. Then, O'Neill argues, if a duty-bearer fails to discharge his or her duties to a bearer of a universal liberty right, the right-bearer has a clear understanding of the specific duty-bearer against whom the right constitutes a claim and of the particular performance required for the right-bearer to have access to the substance of the right.

¹⁰⁴ O'Neill, *Towards Justice and Virtue*, 132.

O'Neill also argues that universal welfare rights do not intrinsically include components that specify the particular duty-bearers against whom these rights constitute claims. Put differently, by their form universal welfare rights may be said to correspond to imperfect duties. O'Neill contends that when we talk about universal welfare rights 'it may be possible to state what ought to be provided or delivered, but it will be impossible to state who ought to do the providing or delivering [...] unless there are established institutions and well-defined special relationships'.¹⁰⁵ Only when the structure of a specific mediating scheme is fixed 'an account of the content as well as the services will take on a definite shape'. She claims that 'all that could be known in advance is that, should a (just) scheme be devised, somebody or other will need to bear yet-to-be specified obligations'.¹⁰⁶ In other words, unless there are institutions in place that form special relationships between right-bearers and duty-bearers, the duties corresponding to a welfare right are imperfect duties instead of special perfect duties. If these perfecting mechanisms exist, then a welfare right is a claimable 'special welfare right' instead of an 'unclaimable' universal welfare right.

O'Neill argues that claimability is a necessary existence condition for a genuine right, and suggests that unless 'obligation-bearers are identifiable by right-holders, claims to have rights amount only to rhetoric'.¹⁰⁷ She concludes that while universal liberty rights and special welfare rights can satisfy the necessary conditions of claimability, universal welfare rights amount only to 'manifesto rights against unspecified others', and they seem 'bitter mockery to the poor and needy, for whom these rights matter most'.¹⁰⁸

¹⁰⁵ Onora O'Neill, *Bounds of Justice* (Cambridge: Cambridge University Press, 2000), 105.

¹⁰⁶ O'Neill 1996, 134.

¹⁰⁷ O'Neill, *Towards Justice and Virtue*, 129. This position is close to Mill's argument. Mill argues that 'no one has a moral right to our generosity or beneficence, because we are not morally bound to practise those virtues towards any given individual'. See Mill, *Utilitarianism*, 75.

¹⁰⁸ O'Neill, *Towards Justice and Virtue*, 132-133; *Bounds of Justice*, 125. For the concept 'manifesto right', see Joel Feinberg, *Social Philosophy* (New Jersey: Prentice-Hall, 1973), 94-95. According to Feinberg, universal social rights in UDHR articles 22-27 are 'rights in an unusual new "manifesto sense", for, unlike all other claim-rights, they are not necessarily correlated with the duties of any assignable persons'.

O'Neill's criticism of universal welfare rights is applicable to the right to asylum. As the right to asylum is a welfare right against no agent in particular, there remains the same issue of claimability as with other welfare rights. There would be no need to vindicate the right to asylum from O'Neill's criticism if it was considered to be a special welfare right. But this would require the existence of a global institutional system of protection with similar mechanisms of allocating responsibilities between duty-bearers as there are for special welfare rights in welfare states. While in the current world there are some institutions dedicated to the protection of persons who are fleeing their home countries, we are far from circumstances under which the moral right to asylum could be considered as a special right. In the current world there are no comparable perfecting mechanisms for imperfect duties corresponding to the moral right to asylum as exist in welfare states protecting special welfare rights. Then the question becomes, how detrimental is O'Neill's criticism to the right to asylum? Does the language of the right to asylum mock the poor and needy asylum seekers? Should we give up on the idea of the right to asylum because there are no global mediating institutions in place that would have perfected the imperfect duties corresponding to it? Next, I will turn to examine three separate lines of argument each of which suggests that we should not too hastily give up on the right to asylum.

3.3 Why we should not give up on the right to asylum?

3.3.1 Objection 1: As liberty rights do not correspond strictly to perfect duties, they face the same issue of claimability as the right to asylum

One way to respond to O'Neill's argument is by showing that her claim according to which only universal welfare rights correspond to imperfect duties is not valid. An attempt to vindicate the right to asylum this way may be considered as a 'negative strategy'. If it is the case that universal liberty rights do not correspond strictly to perfect duties, then both categories of rights face the same dilemma regarding claimability: these rights are against unspecified others and for unspecified actions. If this is shown to be the case, then it may be reasonably asked whether O'Neill's criterion for the genuineness of rights can be correct.

There are two different ways in which the validity of O'Neill's claim that universal liberty rights correspond strictly to perfect duties might be questioned. The first argument appeals to the distinction between 'having' a right and 'enjoying secure access' to the substance of a right. O'Neill's argument relies on a utopian pre-institutional understanding of having rights, and she is not concerned with the range of performances required from others for a right-bearer to enjoy sufficiently secure access to the substance of a right. Only in utopian circumstances where we are not concerned with the protection of rights do liberty rights correspond strictly to perfect duties. In the non-ideal world, however, it is to be expected that not everyone will respect each others' rights. Thus, a meaningful opportunity to have access to the substance of liberty rights is attached not only to perfect duties.

As Henry Shue has famously argued, to have rights in any meaningful sense, i.e., to enjoy secure access to their substance, requires the establishment of protective institutions.¹⁰⁹ Once we move our focus from the utopian pre-institutional circumstances of having rights to the more realistic circumstances of enjoying rights and the establishment of protective institutions, the distinction between welfare rights and liberty rights is no longer obvious. If we are concerned with the protection of rights, both categories of rights will correspond to several kinds of duties. Jeremy Waldron makes this point eloquently. He contends that when we focus on the protection of rights, each right regardless of its form might be 'best thought of not correlative to one particular duty [...] but as generating waves of duties, some of them duties of omission, some of them duties of commission, some of them too complicated to fit easily under either heading'.¹¹⁰ When the question is about the protection of rights, it is not directly evident which specific duty-bearers should do what and towards whom. On these grounds it may be argued that universal liberty rights too correspond to imperfect duties.

¹⁰⁹ Henry Shue, *Basic Rights* (Princeton: Princeton University Press, 1996), 39.

¹¹⁰ Jeremy Waldron, *Liberal Rights – Collected Papers 1981-1991* (Cambridge: Cambridge University Press, 1993), 25.

There is, however, an obvious response available to this line of argument: we should not be concerned with the institutional protection of rights when analysing the genuineness of rights. Isn't the question regarding the existence of a right prior to the question regarding the institutionalisation of a right and its protection? This is surely one way to understand the conditions under which we should be examining the genuineness of rights, but the response of the critic should not be accepted without an explanation. If we are really concerned about rights, then shouldn't we also be committed to their protection?¹¹¹ To give an example, while in our current world the UDHR Article 14 remains far from sufficiently protected, millions around the world have come to enjoy its substance with the help of the United Nations High Commissioner for Refugees (UNHCR), active national governments and many NGOs. At the end of 2009, more than 26 million people – 10.4 million persons that are eligible for asylum under the UN Convention Relating to the Status of Refugees and 15.6 million internally displaced persons – were receiving protection or assistance from the UNHCR.¹¹² During 2009 alone, 19 countries reported the admission of 112,400 resettled Convention refugees.¹¹³ Also, the UNHCR estimates that during 2008-2009 around 2 million stateless individuals were granted a citizenship in a state other than the state of their origin.¹¹⁴ For each of these persons, Article 14 may be argued to amount to something more than 'mockery' and 'rhetoric'.

Conversely, many of the so-called universal liberty rights may be said to constitute mockery and amount only to rhetoric for those millions around the world who are not currently enjoying the substances of these rights. For example, places like Iraq, Iran, North Korea, Saudi-Arabia, Afghanistan, Sudan, and Somalia are not well known for their respect for such universal liberty rights as freedom of speech, freedom of

¹¹¹ As Waldron asks: 'why on earth would it be worth fighting for this person's liberty (say, his liberty to choose between A and B) if he were left in a situation in which the choice between A and B meant nothing to him, or in which his choosing one rather than the other would have no impact on his life?' Waldron, *Liberal Rights*, 7.

¹¹² UNHCR, Global trends 2009, 4-5. Available online: <http://www.unhcr.org/4c11f0be9.html> (accessed 19.07.11).

¹¹³ UNHCR, Global trends 2009, 3. Available online: <http://www.unhcr.org/4c11f0be9.html> (accessed 19.07.11).

¹¹⁴ UNHCR Global Report 2009, 'The Year in Review', 4. Available online: <http://www.unhcr.org/4c08f2ee9.pdf> (accessed 19.07.11).

assembly, and the right not to be subjected to bodily harm. For those millions of persons who are not enjoying the substances of these liberty rights it is not much of a consolation that these rights may be claimed in principle from particular identifiable duty-bearers. When a theorist makes a distinction between pre-institutional and institutional circumstances of rights, it can be easily forgotten that what is at stake with rights is not simply abstract normative claims, but rather genuine human needs and meaningful opportunities for their fulfilment. The strict focus on pre-institutional circumstances in the evaluation of genuine rights has to be explained by the theorist wishing to defend this position, and it is not enough to conveniently insist that only pre-institutional circumstances matter.

For the sake of argument, however, let us accept that the response of the critic is correct, and that we should be strictly focusing our enquiry on the pre-institutional circumstances of having rights instead of protection of rights. There is no need to rely on the success of the previous argument, as there is an alternative way to question O'Neill's claim that universal liberty rights correspond strictly to perfect duties. Even if we examine universal liberty rights in pre-institutional circumstances, it is still not the case that they correspond always and only to perfect duties. Elizabeth Ashford outlines this line of argument in her response to O'Neill. Ashford argues forcefully that O'Neill's claim essentially refers to relationships between a small group of agents, and it no longer applies when we broaden our focus and attempt to accommodate a more complex set of human relations and social institutions (the aim of which is not the protection of rights).¹¹⁵

In our current world, systems of social interaction are extremely complex, and it has become not only extremely hard to avoid harming distant others, but also to trace moral responsibilities for specific violations of liberty rights back to particular identifiable agents.¹¹⁶ Even when moral responsibility may be traced back to

¹¹⁵ Elizabeth Ashford, 'Duties Imposed by the Human Right to Basic Necessities', in Thomas Pogge (ed.), *Freedom from Poverty as a Human Right* (Oxford: Oxford University Press, 2007), 195-198

¹¹⁶ As Judith Lichtenberg rightly points out, the account of harm in the classic formulation of the harm principle, which essentially denotes 'discrete, individual actions with observable and measurable consequences for particular individuals', can no longer in the era of globalisation sufficiently explain

particular agents, the group of agents can be extremely large e.g., all persons in the Western countries. When the question is about actively caused harms that are the result of complex social systems, the picture of claimability of universal liberty rights seems to be more in line with universal welfare rights: there is a large group of duty-bearers who are morally responsible for the right-bearer not having access to the substance of the right.

At this point it might still be argued that the content of the duties corresponding to universal liberty rights nevertheless specify the particular performances required from each duty-bearer even when the question is about large groups of duty-bearers: each duty-bearer should stop actively harming the right-bearer. Therefore, it is still the case that universal liberty rights correspond strictly to perfect duties. But this response is unsatisfactory. It may also be the case that participation in an unjust social institution actively harming a bearer of a universal liberty right is not reasonably avoidable to a duty-bearer. In these circumstances the primary obligation of the duty-bearer is to reform the unjust institution actively harming the right-bearer. This requires positive action, and it is not directly clear what specific acts are required from the duty-bearer.¹¹⁷

What can further complicate the situation is that the collective organisation of duty-bearers may be a necessary condition for any meaningful reformation of the social institution actively harming some persons' universal liberty rights. When respecting a universal liberty right requires positive action from duty-bearers, there can remain the same issue of (un)claimability as with universal welfare rights: duty-bearers are required to do unspecific positive acts. If we follow O'Neill's argument to its logical conclusion, it means that there cannot be genuine liberty rights not to be deprived by unjust social institutions in which particular duty-bearers cannot be reasonably expected to fully avoid participating.¹¹⁸ If this is correct, there are strong reasons to

how our behaviour impinges on the interests of other people. Judith Lichtenberg, 'Negative Duties, Positive Duties, and the New Harms', *Ethics*, 120 (2010), 558-559.

¹¹⁷ Ashford, 'Duties Imposed by the Human Right to Basic Necessities', 201.

¹¹⁸ Ashford, 'Duties Imposed by the Human Right to Basic Necessities', 215.

be sceptical of O'Neill's argument that a right has to correspond strictly to perfect duties in pre-institutional circumstances for it to constitute a genuine right.

The two lines of argument I have presented provide reasons to question the validity of O'Neill's criterion on the genuineness of rights. The first argument suggested that we should be concerned with rights in the sense of protecting secure access to their substance rather than in the pre-institutional sense of having them. When we turn our focus to the protection of rights, it is no longer the case that universal liberty rights correspond strictly to perfect duties. The critic's response that we should focus strictly on pre-institutional understandings of rights should not be accepted without further justification. The onus is on the critic to explain why we should resist the move to more realistic circumstances of rights protection. The second argument suggested that many universal liberty rights are similar to universal welfare rights under complex circumstances of human interaction. When respecting liberty rights requires positive action and social coordination from duty-bearers, it is not directly clear what the duty-bearers are obligated to do. This conclusion suggests that O'Neill's criterion for evaluating the final set of genuine rights is excessively strict. It leads not only to the rejection of all universal welfare rights, but also to the rejection of a broad range of important liberty rights not to be harmed by others.

3.3.2 Objection 2: The existence of global mediating institutions is not a necessary condition for the right to asylum to be claimable

The second reason why we should reject the conclusion that the right to asylum cannot be a genuine right is that contrary to what O'Neill is arguing, the claimability of the right to asylum does not require the existence of global mediating institutions comparable to those existing in welfare states. This is essentially because the establishment of global mediating institutions is not a necessary condition for the imperfect duties corresponding to the right to asylum to become perfected. By its structure the concept of imperfect duty refers essentially to indeterminateness regarding time, place, specific action, and the particular recipient. The welfare state

perfects imperfect duties by functioning as a ‘clearinghouse’.¹¹⁹ It takes from each bearer of imperfect duties an amount of resources which is sufficient to discharge the duty-bearers’ obligations, but not necessarily enough to cover all the needy. The welfare state then distributes the resources to the needy, therefore constituting a mediating link, i.e., a special relationship, between bearers of imperfect duties and the recipients. Within the modern welfare states, a common way of perfecting imperfect duties has been the establishment of a system of taxation.¹²⁰

But while the existence of a welfare state is one way in which imperfect duties may be perfected, it is not the only way. Put differently, the existence of mediating mechanisms that constitute special relationships may be a sufficient condition for the imperfect duties to become perfected, but it is not a necessary condition. Also circumstances can constitute special relationships that perfect imperfect duties. Special relationships that occur in the absence of mediating institutions can specify which particular duty-bearer should discharge duties to which particular recipient, how, and when. If this conclusion is correct, and a special relationship can come into existence due to the occurrence of particular circumstances, it is possible that a right corresponding to imperfect duties can become claimable in the absence of global mediating institutions.

One common example of a scenario in which imperfect duties can become perfected by circumstances is a situation of easy rescue. Circumstances may single out one particular duty-bearer to rescue a needy person because there are no other duty-bearers who would be in a similarly situated position to assist. But even if we expanded the picture from an isolated easy rescue to the assistance of the bearers of the right to asylum, there seems to be no principled reasons why the imperfect duties could not be perfected by circumstances. Duties to assist are imperfect if there are more right-bearers than a duty-bearer may be reasonably expected to assist, or when within a large group of potential duty-bearers it is not directly clear who should do what.

¹¹⁹ This characterisation of the welfare state as a mediating institution is outlined in Waldron, *Liberal Rights*, 17.

¹²⁰ See Feinberg, ‘The Moral and Legal Responsibility of the Bad Samaritan’, 66.

But as for example Zofia Stemplowska rightly points out, from this indeterminacy it does not directly follow that the rights corresponding to imperfect duties are not claimable. She argues that we could just as well allow all those whose universal welfare rights generate imperfect duties to claim assistance from anyone ‘who has not taken reasonable steps to fulfil her or his duty (to whomever and in whatever reasonable way she or he might choose)’.¹²¹ In this type of a system of claimability, a special relationship may be considered to come into existence when a right-bearer singles out a duty-bearer and the duty-bearer has not already taken steps to commit to assist some other right-bearers. The choice of a particular action, the choice of the particular recipient, and the choice of the particular time has in this type of a scenario been decided by the right-bearer on the duty-bearer’s behalf.¹²²

While this type of a system of claimability is surely complex and differs noticeably from a welfare state that contains effective mediating institutions, it nevertheless does constitute an imaginable system of claimability. When we consider the system in the context of the right to asylum, the idea seems less absurd than if implemented as a system of claimability for many other welfare rights. As was suggested earlier, there currently exist no systematic global mechanisms to allocate responsibilities to protect the right to asylum. But the absence of systematic mediating institutions at the global level does not mean that special relationships cannot be formed at all. Special relationships can be said to come into existence when a bearer of the right to asylum enters the jurisdictional territory of a particular state capable of offering protection. In fact, when a person currently seeks asylum in a particular state, he or she is generally said to ‘claim asylum’. For a person to claim asylum is to single out a state comprising bearers of imperfect duties to assist her. Then, it may be reasonably asked whether a state that has not already taken reasonable steps to

¹²¹ Zofia Stemplowska, ‘On the Real World Duties Imposed on Us by Human Rights’, *Journal of Social Philosophy*, 40 (2009), 482.

¹²² Stemplowska recognises that in such a scheme of claimability there would be a ‘need to work out the essential building blocks of this scheme, including, among other things, standards for assessing what counts as taking reasonable steps to fulfil one’s duties, how to set the scheme up in the absence of a centralized system resembling a world state, how to finance it, what standards of proof to use, and how to allow people an adequate chance to fulfil their duties voluntarily’. Stemplowska, ‘On the Real World Duties Imposed on Us by Human Rights’, 482.

discharge its members' imperfect duties to bearers of the right to asylum may reject the claim of a right-bearer entering the state's jurisdictional territory by appealing to the idea of imperfect duties. When a state argues that it wishes to deport a particular right-bearer claiming asylum in order to assist some other non-identified group of right-bearers on some later occasion, the right-bearer who is already claiming asylum may rightly respond with moral indignation.

In the current world, the protection of the UDHR Article 14 is fairly close to this idea of claimability. Therefore, the system of claimability for the right to asylum sketched above is not far-fetched. Currently, the binding *non-refoulement*¹²³ obligation entails that states can find themselves under *de facto* obligation to provide asylum to persons that have entered their jurisdiction and claimed asylum. First-asylum states may not find other states willing to share the burdens, and they cannot deport the asylum seekers back to their home countries. The current system could be restructured to a form that recognises for each state a positive obligation backed with legal sanctions to provide asylum to right-bearers entering the state to claim asylum.¹²⁴ The central reason why the *non-refoulement* obligation has not been revised into a form of positive obligation is centrally because there is a lack of political will to do so, not because to do so would be excessively problematic in practical terms.

3.3.3 Objection 3: The right to asylum can constitute a justificatory ground for the establishment of mediating institutions

The final objection focuses on O'Neill's account of claimability as an existence condition of a right. It may be reasonably asked why is it exactly that claimability in

¹²³ The *non-refoulement* obligation is outlined, among other treaties, in Article 33 of the 1951 UN Convention Relating to the Status of Refugees. Article 33 of the Convention states that 'no contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened'. I will examine the *non-refoulement* obligation more closely in the next chapter.

¹²⁴ Of course, the proposed system of claimability would in all likelihood lead to an extremely unfair distribution of burdens between duty-bearers. Therefore, it would not be the best of all possible systems of claimability. But the resulting unfairness in burden-bearing does not have to be seen as directly undermining the current argument. What the argument on unfair burden-bearing between duty-bearers suggests is that there are moral reasons to institutionalise the proposed system of claimability to a form in which the overall burdens of refugee protection would be distributed fairly. But as such it does not invalidate the argument that a system of claimability for the right to asylum is imaginable in the absence of global mediating institutions comparable to those existing in welfare states.

the sense O'Neill formulates it constitutes a necessary condition for the existence of a right? As has been noted already, claimability in the sense that O'Neill is referring to requires that particular duty-bearers responsible for the violation or the unfulfilment of a person's rights are identifiable. The exact identification of the particular agent responsible is surely a central condition for establishing blameworthiness. After all, rights do confer to their bearers a status that one may not be violated in certain ways, and when a person's rights are violated the person can be said to have a claim to remedy. But following John Tasioulas it may be reasonably asked why we should hold the identification of the particular responsible duty-bearers as a necessary condition for the existence of a right?¹²⁵

Here, O'Neill's own argument on prior questions regarding rights may be turned against her. As was noted earlier, O'Neill argues that we should focus on the pre-institutional circumstances of rights violations. But we may just as well ask from her why we should be focusing on the violations or the unfulfillment of rights instead of the prior question regarding their existence. The allocation of duties may be understood as a further question of strategy that follows the moral question regarding the existence of a right, and it can be argued that the deontic implications of a right are essentially dynamic. This approach to the concept of right differs noticeably from O'Neill's approach.¹²⁶ It starts by examining what exactly can constitute a sufficiently weighty reason to hold others under a duty of justice.¹²⁷ The right functions as a justificatory foundation for obligations to make the corresponding imperfect duties perfect.¹²⁸ Then, the vindication of a universal right to asylum is not dependent on its pre-institutional claimability, but instead primarily on whether or not the need for asylum under certain circumstances of deprivation is sufficiently

¹²⁵ In the words of John Tasioulas: 'Why should this indeterminacy – which, in any case, reflects the existence of a healthy plurality of mechanisms for securing the right rather than uncertainty as to whether there is any realistically available means of doing so – undermine the very existence of such rights prior to their institutional embodiment?'. John Tasioulas, 'The Moral Reality of Human Rights', in Thomas Pogge (ed.), *Freedom from Poverty as a Human Right* (Oxford: Oxford University Press, 2007), 94.

¹²⁶ As Waldron points out, it may be the case that the phrase 'moral right' does not have a single correct meaning. Waldron, *Liberal Rights*, 206.

¹²⁷ See Joseph Raz, 'On the Nature of Rights', *Mind*, 93 (1984), 194-214; James W. Nickel, 'How Human Rights Generate Duties to Protect and Provide', *Human Rights Quarterly*, 15 (1993), 77-86.

¹²⁸ Kok-Chor Tan, *Justice without Borders – Cosmopolitanism, Nationalism, and Patriotism* (Cambridge: Cambridge University Press, 2004), 52.

weighty to ground obligations of justice in others. The universal right to asylum, which was argued in the second chapter to be grounded in the more fundamental right to necessities, generates binding moral obligations for the creation of circumstances under which it becomes a realisable right to all right-bearers.¹²⁹ In other words, there are indirect duties corresponding to the right to asylum to create, maintain, and enhance global mediating institutions that directly fulfil the right.¹³⁰ Joel Feinberg argues that universal welfare rights that correspond to imperfect duties constitute ‘permanent possibilities of right, the natural seed from which rights grow’.¹³¹ But if it is correct that the need to asylum constitutes a sufficiently weighty reason to ground duties of justice in others, it may be considered as something more than simply a ‘possibility of right’. It is then a possibility with the weight of justice attached to it.

At this point it might be responded that the argument overlooks the fact that imperfect duties are unenforceable. From a moral point of view, to say that a duty is enforceable is to argue that agents can be externally coerced, if needed, to comply with the demands of the duty. The practical enforcement then means at the very least threatening those who fail to comply with their duties with legal or social sanctions. In other words, the enforcement of duties extends beyond moral condemnation to the sphere of threats and external coercion. The argument regarding the unenforceability of imperfect duties may be understood either as a claim that imperfect duties are such that they cannot be enforced or as a claim that they should not be enforced.

But there is nothing in the concept of imperfect duty to support either of these objections. The concept refers to latitude, which has already been suggested to be perfectible with the occurrence of circumstances that constitute special relationships and with the establishment of mediating institutions. There is also nothing in the

¹²⁹ Amartya Sen argues that there can be a metaright to have policies $p(x)$ that genuinely pursue the objective of making the right to x realisable. Amartya Sen, ‘Rights and Metarights’, *The right to Food*, eds. Philip Alston & Katarina Tomasevski (Hague: Nijhoff Publishers, 1984), 70.

¹³⁰ Henry Shue, ‘Mediating Duties’, *Ethics*, 98 (1988), 696.

¹³¹ Joel Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton: Princeton University Press, 1980), 153.

concept about normative justification against enforcement.¹³² While clearly enforceability requires that the duties are specifiable, this constitutes only a practical epistemic condition for enforcement. It does not undermine the justification of the enforcement of duties of assistance, and it carries no moral weight in the argument.

To simply claim that imperfect duties should not be enforced because they are imperfect duties is to beg the question regarding the legitimacy of enforcement altogether. Before it can be concluded that imperfect duties should not be enforced it needs to be shown that a particular right that corresponds to imperfect duties is not sufficiently weighty to function as a justificatory concept for the enforcement of duties. As Kok-Chor Tan rightly points out, ‘although charity is unassignable and unenforceable, it does not follow that all that is unassignable and unenforceable is charity. The imperfect duties corresponding to various rights are not charitable acts but duties, even if it means that we need to first assign and specify them before they can be fully enforced.’¹³³

Thus, one available reply to the criticism according to which the right to asylum amounts to a ‘manifesto right’ is: ‘so what?’ Whether we in the end call the unrealisable right to asylum as ‘metaright’, ‘manifesto right’, ‘a possibility of rights’, ‘claim to’, or as a ‘genuine right’ is a matter of indifference. The right to asylum grounds binding moral demands for the structuring of all territorial political communities. The fact that a universal normative standard is not in the current global circumstances fully realised, and the fact that there exists no systematic non-arbitrary mechanisms for the allocation of duties of beneficence prior to its global institutionalisation, do not warrant the conclusion that the standard itself should be abandoned.

To give up on the idea of the right to asylum before genuine attempts to establish global mediating institutions have been made is to overlook the moral weight of the

¹³² See also Waldron, *Liberal Rights*, 17. Waldron argues that nothing in the concept of imperfect duty justifies the complaint that it is wrong to enforce an imperfect duty, ‘for the difference between perfect and imperfect duty has to do with the occasions for performance, not issues of moral importance and not issues of enforceability’.

¹³³ Tan, *Justice without Borders*, 52.

claim to asylum and the fact that there are perfectible duties corresponding it. The excuse of inadequate institutions that is used to defend the abandonment of universal welfare rights such as the right to asylum is, in the words of Shue, ‘not simply misguided, but perverse. The absence of the means for fulfilling a goal is being used as the excuse for not fulfilling it, when, if we seriously had the goal, we would be working on the creation of the necessary bridges from here to there.’¹³⁴

3.4 Guidelines for the institutionalisation of the right to asylum

So far I have considered three alternative ways to vindicate the right to asylum from O’Neill’s criticism. In this final section, I will consider whether there are any guidelines for institutionalising the general right to asylum. If there are no guidelines at all for establishing mediating institutions that function to perfect imperfect duties, there is a somewhat hollow ring to the argument that institutions should be established. In the end, however, it is not the case that there are no guidelines at all for establishing institutions that perfect imperfect duties in efforts to protect the right to asylum.

Before turning to examine what general guidelines there are for the establishment of institutions perfecting imperfect duties, it is important to recognise that there are two different levels on which imperfect duties corresponding to the general right to asylum need to be perfected. As was pointed out earlier in the current chapter, one mediating institution that can perfect the duties corresponding the right to asylum is the state. The state may be understood to constitute a ‘clearinghouse’ that can help to perfect the imperfect duties of its citizens by – among other things – taxing them and by using the taxes to make collective provisions for asylum seeking right-bearers. But the issue of perfecting imperfect duties does not occur strictly on the individual level. In addition to the individual level, there is a need to perfect duties also on the interstate level. Unless there are some kind of perfecting arrangements between states, each particular state is practically in identical situation as individual duty-bearers whose duties are not being perfected by mediating institutions: it remains

¹³⁴ Henry Shue, ‘The Interdependence of Duties’, in Philip Alston & Katarina Tomasevski (eds.), *The Right to Food* (Martinus Nijhoff Publishers, 1984), 94.

unclear which state should do what in the global efforts to protect the right to asylum.

The two levels are interconnected to each other. In fact, the perfection of duties on the interstate level may be understood as an essential step in further efforts to perfect individual duty-bearers' imperfect duties. This is centrally because states cannot satisfactorily perfect their citizens' duties unless it is clear what citizens of each state should collectively do in the global protection of the right to asylum. Put differently, clarifying collective action on the interstate level helps also to solve unclarities regarding action on the individual level. Once it is clearer what a state should do for particular right-bearers, the state can move to implement specific intra-state institutions that perfect the imperfect duties of its citizens.

The right to asylum can give us guidance on efforts to perfect imperfect duties both on the interstate level and within states. Apart from constituting a justificatory foundation for the obligation to establish mediating institutions, the right to asylum serves as a normative standard for the evaluation of different specific institutional models. Following Ashford, it may be argued that in global institution-building the right to asylum can function 'as a test of whether existing institutions are minimally just: as long as they fail to guarantee the right for every human being, and such failure is reasonably avoidable, they are judged to be unjust'.¹³⁵ Or in the words of John Rawls, existing institutions can be judged in the light of an ideal, and they can be 'held to be unjust to the extent that they depart from it without sufficient reason'.¹³⁶ In other words, the right to asylum allows us to morally condemn the existing institutions as unjust if they fail to provide to all right-bearers access to its substance when such failure is reasonably avoidable.

There is also a second evaluative function that the right to asylum has as a normative standard. Different alternative institutional proposals may be ranked as to how they realise the protection of the right to asylum. The effective realisation of the aim of

¹³⁵ Ashford, 'Duties Imposed by the Human Right to Basic Necessities', 216-217.

¹³⁶ John Rawls, *A Theory of Justice* (Harvard: Harvard University Press, 1999a), 216. See also John A. Simmons, 'Ideal and Nonideal Theory', *Philosophy and Public Affairs*, 38 (2010), esp. 12-18.

rights protection is morally desirable, and institutions can be evaluated on the grounds of how they are designed to realise this end. Put differently, the right to asylum provides a guideline for choosing between different institutional schemes in which the obligations of duty-bearers take a particular more tangible form. An institutional proposal may be said to be more appealing, *ceteris paribus*, the more extensively it is able to provide for bearers of the right to asylum access to asylum.¹³⁷ In other words, the right to asylum serves a dual function as an evaluative standard. It allows us to normatively evaluate whether the currently existing institutions are just or unjust as well as to evaluate the comparative moral appeal of different still unrealised institutional models.

In addition, the perfection of imperfect duties through the establishment of mediating institutions is limited by the existence of other requirements of justice, both negative and positive. This means that the specific proposals of mediating institutions and responsibility roles of particular duty-bearers need to be such that they are compatible with the more general idea of justice. Put differently, other considerations of justice constitute the framework within which mediating institutions are to be accommodated. There are, of course, many particular ways in which mediating institutions aiming to provide secure access to the substance of the right to asylum may be unjust. Consider three such possibilities. Firstly, an institutional proposal is unjust if the proposed institutions are designed to enforce assistance beyond the point to which duties of justice extend. The mediating institutions should be constructed in such a way that they do not unjustly enforce assistance, and this general position can function as a guideline for perfecting imperfect duties with mediating institutions. Secondly, an institutional proposal is unjust if it arbitrarily singles out and enforces duties of only a particular sub-group of duty-bearers. For example, if the interstate institutions were biasedly designed to enforce duties of citizens in the developing countries but not in the developed countries, the existing institutional regime would

¹³⁷ In general terms, institutions can be designed more or less 'optimally'. Optimality may be defined as an institution's 'goodness of fit' to its environment. But mere optimal fitness to an environment does not provide sufficient grounds to establish a general conclusion regarding institutional design. As Robert Goodin rightly notes, the general definition of an optimally designed institution consists solely of 'internal' criterion of evaluation, and it needs to be complemented with other 'external' moral criteria. Robert E. Goodin, 'Institutions and their Design', in Robert E. Goodin (ed.), *The Theory of Institutional Design* (Cambridge: Cambridge University Press, 1996), 37.

clearly be unjust. Finally, a proposal on mediating institutions is unjust if providing persons secure access to the substance of the right to asylum leads to the violation of their other rights, such as their right to dignity.¹³⁸ If this is found to be the case, the proposal should be abandoned for other proposals in which these kinds of unjust mechanisms remain absent.

The specific institutions implemented to perfect the imperfect duties of particular duty-bearers depend, of course, on the unique characteristics of the context. Therefore, there cannot be a comprehensive context-independent guideline on how exactly the mediating institutions should be established, and who should do what. Yet, the above guidelines offer us assistance in institutionalising the right to asylum. Admittedly the guidelines that I have presented here are still incomplete as they include unanswered moral questions. But this does not have to be understood as an insurmountable problem for the theory of the right to asylum. The proposed ‘incomplete’ guidelines move the debate from the question regarding the genuineness of the right to asylum to questions regarding the moral nature of existing institutions and the possible institutional alternatives.

Conclusion

In this chapter, I have claimed that O’Neill’s criticism of universal welfare rights does not prove to be detrimental to the right to asylum. I have outlined three separate lines of argument each of which supports the same conclusion from a different perspective. The first argument suggested that once we look at rights in the institutional context of protecting rights rather than having rights, both liberty rights and welfare rights face issues of claimability. The second argument suggested that the right to asylum can be claimable regardless of the absence of global mediating institutions. The state constitutes a territorial institutional unit in principle capable of protecting the right to asylum, and the right-bearers can claim the right by entering the territory of a state. The third line of response pointed out that the account of rights O’Neill outlines is not the only account available. An alternative way to

¹³⁸ In chapter five, where I will consider the moral appeal of the tradable refugee quota scheme, I will examine more closely the issue of institutions that may be said to be violating right-bearers’ dignity.

understand rights is to consider them as ‘normative resource bases’ that can ground not only direct duties of respect, but also indirect duties requiring the duty-bearers to establish protective mediating institutions. In the chapter I have also suggested that the perfection of imperfect duties with mediating institutions is not a moral project for which there are no guidelines. I concluded the chapter by claiming that the right to asylum and other considerations of justice constitute the central framework for institution-building.

4. The existing global refugee regime and its moral dimensions

So far I have outlined an account of the general moral right to asylum. I have also defended the right to asylum against the objection according to which it does not constitute a genuine right. In the current chapter, I will examine the existing global institutional framework by using the general moral right to asylum as a normative evaluative standard. The central question that I will focus on in the chapter is: taking into consideration the normative theory outlined in the previous chapters, what should we make of the existing institutions dedicated to assisting persons fleeing their home countries, i.e., do the existing global institutional arrangements adequately take into consideration the moral right to asylum, or should they be restructured? In the chapter I will conclude that the existing institutional arrangements are morally unsatisfactory and that they should be restructured.

I will proceed with the chapter in the following way. In the first section, I will outline a historical overview of the emergence of the currently existing ‘global refugee regime’, i.e., interstate instruments protecting a range of persons fleeing their home states due to the violence and other forms of severe harm. In the second section, I will move to examine the ‘refugee status’, which makes a person eligible for asylum in the current refugee regime. In the section I will conclude that the ‘prescriptive refugee status’ outlined in the 1951 UN Convention Relating to the Status of Refugees is morally unsatisfactory, and that the global refugee regime should be dedicated to protect all persons with the moral right to asylum. In the final section, I will focus on examining another central element of the global refugee regime, the *non-refoulement* principle, more closely. In the current world, the principle of state sovereignty overrides the requirement to grant asylum to any needy non-citizens, and the only meaningful mechanism protecting persons fleeing their home countries is the *non-refoulement* principle. This principle requires that states abstain from expelling or returning persons to the frontiers of territories where their life or freedom would be threatened. I will claim that if the conclusion regarding the existence of a moral right to asylum outlined in the previous chapters is valid, the *non-refoulement* principle should be given up as the central mechanism of refugee

protection. This is for two central reasons. Firstly, the protective institutions founded on the *non-refoulement* principle do not adequately recognise that some of the asylum seekers can have binding claims of justice against all states with capacities to assist them. Secondly, the *non-refoulement* principle distributes the burdens of protection primarily on the grounds of proximity instead of considerations of justice.

4.1 The historical emergence of the existing global refugee regime

Humans have migrated throughout history, but never before have such systematic migration controls been in place as in the contemporary world. The modern world is a world of exclusive territorial states, and citizen, refugee, asylum seeker, non-national, resident, and illegal immigrant are all assigned statuses with which states control movement across borders, residency, and access to goods within their jurisdictional territories. States have come to establish an elaborate institutional migration structure that restricts immigration to a great degree. The currently existing physical migration structure connects states to each other with roads, railroads, airports, and harbours, and due to its form the physical obstacles of migration to nearly anywhere in the world are fairly low. But the institutional migration structure has a decisive role in the final opportunity of migrants to enter other countries. The institutional migration structure consists of institutional rules and interactive routines existing between states. States provide passports to their members, engage in border control, and recognise certain international obligations on the treatment of non-members within their territories.

Currently, the institutional rules in the global migration structure are asymmetrical by their general form. While in international law there is a general right to exit from any state outlined, international law stops short of recognising a general right of entry to countries other than a person's home country. The United Nations Declaration of Human Rights (UDHR) Article 13(1), for example, recognises the right to freedom of movement, but only within each particular state. The Article declares that 'everyone has the right to freedom of movement and residence within the borders of each state'. Article 13(2), in turn, recognises the right of exit without a

corresponding right of entrance to any other state.¹³⁹ It declares that ‘everyone has the right to leave any country, including his own, and to return to his country’.¹⁴⁰ In the words of Phillip Cole, in the current global migration structure the ‘freedom of movement for citizens of the state is symmetrical, in that they have rights of both arrival and departure; but it is asymmetrical for non-citizens, who only have rights of departure’.¹⁴¹

Although affluent democratic countries are making multilateral commitments for freer movement – developments of intra-EU freedom of movement being an example of this – there are no similar developments towards freedom of migratory movement between developed and developing countries. Restrictive migration controls towards immigrants from developing countries remain firmly in place. In fact, many developed countries are engaging in efforts to control the emigratory movement in the departure countries.¹⁴² What cements this institutionalised asymmetry is public opinion, which in several countries has strongly turned towards supporting stricter immigration controls. In many European countries – including The Netherlands, Austria, France, and Finland – right wing political parties have seen a rise in their support, and they have found that anti-immigration appeals to national security, to

¹³⁹ The first famous document on rights that explicitly recognises individuals’ right to emigrate was Magna Carta (1215), which states that ‘it is allowed henceforth to any one to go out from our kingdom, and to return, safely and securely, by land and by water, saving their fidelity to us, except in time of war for some short time, for the common good of the kingdom [...]’. Quoted in Frederik G. Whelan, ‘Citizenship and the Right to Leave’, *The American Political Science Review*, 75 (1981), 640. The limited right of free movement recognised in the first version of the Magna Carta was, however, short-lived, as it was omitted from all following versions of the document by the English Kings who reasserted their prerogative to control travel abroad. The doctrine of ‘perpetual allegiance’ started to emerge, which bound the individuals’ allegiance to the Crown by birth instead of contractual ‘voluntarism’. Whelan, ‘Citizenship and the Right to Leave’, 640-641.

¹⁴⁰ Ann Dummett argues that ‘it is an absurdity to assert a right of emigration without a complementary right of immigration’ if there does not exist ‘a number of states which permit free entry’. She concludes that under the current framework of transnational migration there exists no such states, and the right of emigration is therefore not ‘a general human right exercisable in practice’. Ann Dummett, ‘Natural Law and Transnational Migration’, in Brian Barry & Robert E. Goodin (eds.), *Free Movement – Ethical Issues in the Transnational Migration of People and of Money* (London: Harvester Wheatsheaf, 1992), 173.

¹⁴¹ Phillip Cole, *Philosophies of Exclusion – Liberal Political Theory and Immigration* (Edinburgh: Edinburgh University Press, 2000), 45.

¹⁴² A clear example of this type of advocacy is the proposal suggested at the highest level of EU politics for the maintenance of ‘The Fortress Europe’. In 2002 Tony Blair and José María Aznar proposed in a European Council meeting that the European Union withdraw aid from countries that did not take effective steps to control the flow of illegal emigrants to the EU. Jagdish Bhagwati, ‘Borders beyond Control’, *Foreign Affairs*, 82 (2003), 98.

the maintenance of the welfare system for compatriots, and to a common societal ethos can be cultivated and cashed as political capital.

The asymmetrical nature of the global migration structure complicates the position of those who flee their home countries due to violence and other forms of severe harms. In recent decades, civil conflicts in the former Yugoslavia, Sri Lanka, Somalia, and the wars in Afghanistan and Iraq have displaced a large number of persons. In 2008 there were altogether around 42 million persons worldwide who the United Nations High Commissioner for Refugees (UNHCR) recognised as ‘forcibly displaced’.¹⁴³ In the currently existing global migration structure those who flee violence and other forms of severe harm are not entitled to freely enter any other territorial state. This means that those attempting to exit their home countries may be faced with protracted circumstances of severe deprivation. Their prospects for a decent life in their home country may be non-existent, but they still do not enjoy the right to rebuild their life in any other country. In a world with asymmetrical migration controls and statuses non-members are essentially, as Michael Walzer points out, ‘vulnerable and unprotected in the marketplace’, they face a constant threat of expulsion, and ‘statelessness is a condition of infinite danger’ for them.¹⁴⁴

Within the existing exclusive global system states have come to recognise that some persons are in desperate need of shelter in other countries, and they have taken steps to address the issue with the establishment of what may be called the ‘global refugee regime’. The global refugee regime can be understood as a set of international institutions aiming to provide protection and assistance to a range of persons escaping circumstances of severe deprivation in their home countries. The global refugee regime is comprised of international legal treaties, state practices, norms, and supranational mediating institutions. States constitute the fundamental units of the global refugee regime, but the regime effectively exists ‘between’ states. The currently existing refugee regime has gradually evolved into its particular form, and

¹⁴³ UNHCR, Global Trends 2008, 3. Available online: <http://www.unhcr.org/4a375c426.html> (accessed 19.07.11).

¹⁴⁴ Michael Walzer, *Spheres of Justice – A Defence of Pluralism and Equality* (Oxford: Blackwell, 1983), 31-32.

its emergence is closely attached to the emergence of the asymmetrical institutional migration structure.

In the early modern Europe, those migrants who were escaping their home countries due to violence or other forms of severe harm were still not distinguished from other prospective immigrants. These groups were relatively small at the time, and many of them migrated to newly found territories.¹⁴⁵ Historically the first group to whom the term ‘refugee’ was assigned was the Huguenots.¹⁴⁶ By the time the French revolution of 1789 took place, refugee protection had already emerged as an international political issue. Some countries were willing to assist fleeing French aristocrats by providing them with a safe haven, as they saw it as an opportunity to protect the balance of power in Europe. But during this early modern era there was no refugee regime to speak of, as states acted in a fully *ad hoc* fashion when dealing with persons escaping from their home countries.¹⁴⁷

The freedom of immigration those escaping their home countries had enjoyed in the early modern centuries was systematically curtailed towards the 19th and 20th centuries. The 19th century constituted an era of experimentation in migration controls, and it saw the emergence of practices that became a central part of the asymmetrical migration controls existing in the contemporary world. Probably the most distinctive historical developments that contributed to the eventual emergence of the currently existing asymmetrical institutional migration structure were the democratic revolutions and industrialisation.¹⁴⁸

Towards the end of the 19th century, democratic Western countries started to drop limitations on their citizens’ expatriation, and the right to leave was quickly

¹⁴⁵ James C. Hathaway, ‘The Evolution of Refugee Status in International Law: 1920-1950’, *International Comparative Law Quarterly*, 33 (1984), 348.

¹⁴⁶ The mass flight of Huguenots was caused by King of France Louis XIV after the revocation of the Edict of Nantes, and more than 200,000 Huguenots fled France to The Netherlands, England, Switzerland, Germany, and The United States. Dowty, *Closed Borders*, 34-35; Laura Barnett, ‘Global Governance and the Evolution of the International Refugee Regime’, *International Journal of Refugee Law*, 14 (2002), 239.

¹⁴⁷ Barnett, ‘Global Governance and the Evolution of the International Refugee Regime’, 240.

¹⁴⁸ Stephen Castles, ‘The Factors that Make and Unmake Migration Policies’, *International Migration Review*, 38 (2004), 856.

becoming a general characteristic of a democratic state.¹⁴⁹ But this era should not be interpreted as a *laissez-faire* era of migration. States took an active interest in those who crossed the border in either direction, and classifications of ‘desirable’ and ‘undesirable’ migrants were widely implemented.¹⁵⁰ New bureaucratic regulations on immigration started to emerge, and these regulations primarily targeted persons entering from particular countries. Often the regulations were racially and culturally limited, and they effectively amounted to institutionalised racism.¹⁵¹

During the 20th Century, the institutional migration structure gradually became a complex system that recognised status-based movement between territorial jurisdictions.¹⁵² After the outbreak of the World War I, migration between countries became heavily regulated. Passports, which had not been required prior to the war in many countries, became a permanent feature of the institutional migration structure. Also, during the first half of the 20th century restrictive Marxist-Leninist countries arose, and started to curb migration extensively both outwards and inwards. The collectivist Marxist-Leninist countries were centrally concerned with homogeneity within the states and mobilisation of the public behind the ruling power.¹⁵³ During this era greater numbers of people was confined behind their national territorial boundaries than during any previous period in history.

The Soviet Union led the example of the collectivist states, effectively restricting free movement out of the country of most of its citizens by requiring practically

¹⁴⁹ In 1870, Britain successfully voted for the right of citizens to expatriate, and it was implemented in general apart from those skilled workers heading for the United States. Thus, in Britain the 19th century marked a shift from the doctrine of ‘perpetual allegiance’ to the Crown, which had been in place since the feudal times. Following Britain, other European countries started to dismantle exit restrictions. By the end of the century, it was possible to exit relatively freely from almost any European or American country and enter another. Dowty, *Closed Borders*, 45-46.

¹⁵⁰ Castles, ‘The Factors that Make and Unmake Migration Policies’, 856.

¹⁵¹ Such may be considered to be the case for example with the Chinese Exclusion Act in the United States (1882), The Chinese Immigration Act in Canada (1885), and the Australia’s Immigration Restriction Act (1901), which is more famously – or rather infamously – known as the ‘White Australia Policy’. Cole, *Philosophies of Exclusion*, 30.

¹⁵² This complexity is well exemplified by the Britain’s 1981 Nationality Act, which recognises British citizenship, British Dependent Territories Citizenship, British Overseas Citizenship, British National, British Subject, British Protected Person, Commonwealth Citizen, and Citizens Eire. Only the first category enjoys an automatic right of entry to the UK and full citizenship rights, and all the other classifications are more or less hierarchical in their degree of belonging to Britain. Cole, *Philosophies of Exclusion*, 35.

¹⁵³ Dowty, *Closed Borders*, 61-62.

unattainable exit visas, by applying technological innovations to control its borders, and by requiring that the relatives of an illegally exiting person renounced the person and pledged their allegiance to the country.¹⁵⁴ While exit visas were often impossible to get, a person caught attempting an illegal exit to a capitalist state was usually charged with treason, and in the worst case received the death penalty. Exit permits were considered primarily as a concession by the state instead of a right, and their central function was to serve foreign policy ends and to get rid of individuals who were seen as problems or threats to the state.¹⁵⁵

At the turn of the 21st century, after the collapse of most Marxist-Leninist states, the restrictions on migratory movement have become increasingly one-sided and asymmetrical. In the current transnational migration framework the democratic understanding of migration controls that started to develop in the late 18th century and throughout the 19th century has become more dominant and recognised worldwide. While there still remains Communist countries, such as Cuba and North Korea, which heavily restrict the exit of their citizens, the tendency to extensively control and limit immigration while leaving doors open for exit has cemented itself in modern transnational practices of migration as well as to rights documents and international law.¹⁵⁶

Within the currently existing ‘asymmetrical’ migration framework states have attempted to address the circumstances of some of those persons who are escaping

¹⁵⁴ In line with the perception of exit as a state-authorised privilege instead of a fundamental natural right, the Soviet Union refused to accept the language of the UDHR signed in 1948. The Soviet Union proposed additional language of its own to be included in Article 13(2) of the UDHR, which outlines the right of each individual to exit the countries of their nationality. The proposal was to integrate the sentence ‘in accordance with the procedure laid down in the laws of that country’ in the Article. The Soviet argument in defence of the proposed sentence was that states should not be asked to change their existing laws, as this would amount to interference in the domestic affairs of sovereign states. Dowty, *Closed Borders*, 72, 111-112.

¹⁵⁵ Dowty, *Closed Borders*, 74-76. While in philosophical enquiries defences of exit restrictions are not very common, attempts at their justification can be traced back to Plato. In *Laws* and in *Crito*, Plato recognises severe restrictions on individuals’ travels abroad. On his account, the right to travel outside Athens is a privilege accorded to those older citizens who have proved their loyalty to the city-state, and even then, these travels must be permitted and supervised by the government. Whelan, ‘Citizenship and the Right to Leave’, 643-644.

¹⁵⁶ The right of exit has become, as Rainer Bauböck notes, ‘firmly anchored in the canon of democratic liberalism’ and it has been ‘elevated beyond citizenship to the level of universal human rights, which ought also to be respected by non-liberal regimes’. Rainer Bauböck, *Transnational Citizenship* (Hants: Edward Elgar Publishing, 1994), 142.

their home countries due to threats of severe harm. The founding of the League of Nations at the end of the First World War marks the first genuine step towards the existing global refugee regime. The League of Nations led to the creation of the High Commissioner for Refugees (HCR) in 1921. The HCR was set up as a temporary agency to deal with persons fleeing the 1917 Russian revolution. This was the first time 'the refugee problem' was recognised as an international problem requiring an international solution, and the first time instruments of international scope were adopted to protect persons fleeing from their home countries.¹⁵⁷ But the HCR did not outline a systematic general account of the conditions under which a person ought to be considered as refugee eligible for asylum, and instead assigned the status of refugee according to group affiliation and origin.¹⁵⁸ In other words, the protection of persons by the HCR was still 'particularist' in that it did not expand to cover all those who were in an equally severe position.

The global refugee regime started to receive its current universalised form in the aftermath of the Second World War with the establishment of the United Nations. The Universal Declaration of Human Rights (UDHR) marks the first time that a right pertaining to asylum (Article 14) was articulated in an international treaty. The displacement of millions of persons during and after the war prompted states also to draft the UN Convention Relating to the Status of Refugees (1951).¹⁵⁹ A central reason for the attempts to ratify an international treaty on refugee protection was the existing problem of forced migration in Europe. The final form of the Convention was restricted in that it addressed the situation of only those who had been displaced prior to January 1st 1951, and due to 'events occurring in Europe'. These limitations were included because states taking part in the Convention did not want to sign a 'blank check' on refugee protection. The regional program was eventually universalised when the European restrictions existing in the Convention were

¹⁵⁷ Hathaway, 'The Evolution of Refugee Status in International Law: 1920-1950', 351. According to Hathaway, The International Red Cross Committee appealed to the council of the League of Nations to assist Russian refugees, and they characterised the need for action as an 'an obligation of international justice' instead of a 'humanitarian duty'.

¹⁵⁸ Barnett, 'Global Governance and the Evolution of the International Refugee Regime', 242.

¹⁵⁹ The Convention was drafted between 1948 and 1951 by UN organs and ad hoc committees, and eventually delegates from 26 countries deliberated on it for more than three weeks. James C. Hathaway, *The Law of Refugee Status* (Vancouver: Butterworths, 1991), 6.

abandoned with the implementation of the 1967 Refugee Protocol. With the Protocol the existing obligations were no longer limited to the pre-1951 events.¹⁶⁰ The Convention may be understood as the cornerstone of the existing global refugee regime, as it is the most broadly ratified instrument of refugee protection. In the aftermath of the Second World War it constituted an important step towards the universalised protection of persons escaping their home countries due to severe harms.

4.2 Whom should the global refugee regime protect?

The underlying humanitarian ideals in the Convention are clear enough. Although our world may not be a perfect one, and although there may occur such horrors as the Second World War, it should at the very least be ensured that those who are displaced from their home states are treated by other states with dignity, and that conditions of decency are provided for them by the international community.¹⁶¹ But while there may have existed truly altruistic humanitarian motives in the efforts to establish a functioning global refugee regime with the drafting of the Convention, in the end political reality and the national interests of states heavily affected the specific form the Convention eventually received. This effectively means that the existing global refugee regime falls short of the humanitarian ideals that partly prompted the systematic construction of institutions that aim to protect those in need in the first place. In the words of Satvinder Singh Juss, the foundation for the current global refugee regime was laid by political attempts to ‘reconcile between two irreconcilables: humanitarian need on the one hand, and sovereign state control on the other’. It is essentially founded on a compromise, and ‘even as a compromise, it was a partial compromise’.¹⁶² One of the elements of the global refugee regime to which the national interests of states have impacted is the definition of refugee. In a descriptive sense the term refugee may be used synonymously with the term ‘forced

¹⁶⁰ The words ‘as a result of events occurring before 1 January 1951’ were omitted from Article 1 of the Convention, which outlines the definition of refugee.

¹⁶¹ See also Ivor C. Jackson, ‘The 1951 Convention relating to the Status of Refugees: A Universal Basis for Protection’, *International Journal of Refugee Law*, 3 (1991), 403-405.

¹⁶² Satvinder Singh Juss, *International Migration and Global Justice* (Aldershot: Ashgate, 2006), 201.

migrant’.¹⁶³ But the term is also used in a prescriptive sense. In this latter sense, the term refugee may be understood to denote a status that makes a person eligible for certain entitlements that the status accords, i.e., eligibility for asylum.¹⁶⁴

According to the Convention, the necessary and sufficient conditions for a person to qualify for the status of refugee and therefore to be eligible for protection under the Convention are that the person has ‘a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’¹⁶⁵

Politicians, academics, judges, legal experts, and human rights activists have interpreted the prescriptive concept of refugee outlined in the Convention in several incompatible ways. Some have followed ‘the accountability approach’.¹⁶⁶ This approach suggests that infliction of severe harm needs to be linkable to state agents

¹⁶³ For example, the Oxford English Dictionary provides a descriptive account of the term ‘refugee’, stating that the term denotes a ‘person who has been forced to leave their country in order to escape war, persecution, or natural disaster’.

¹⁶⁴ See also Aristide R. Zolberg & Astri Suhrke & Sergio Aguayo, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (Oxford: Oxford University Press, 1989), 3.

¹⁶⁵ The requirement that persecution has to occur due to the five categories mentioned in the Convention is commonly known as ‘the nexus clause’. According to Hathaway, the initial rationale for incorporating the nexus clause in the Convention was not that persons cannot be persecuted for other reasons and therefore be facing an equally severe risk of harm, but rather that in the historical context when the Convention was drafted ‘persons affected by these forms of fundamental socio-political disfranchisement were less likely to be in a position to seek effective redress from within the state’. Hathaway, *The Law of Refugee Status*, 136.

¹⁶⁶ Matthew E. Price is one of the proponents of the view that the infliction of severe harm needs to be linkable to a government of a state for persecution to occur. On his view, persecution should be ‘defined as serious harm inflicted or condoned by official agents for illegitimate reasons’. Matthew E. Price, *Rethinking Asylum: History, Purpose, and Limits* (Cambridge: Cambridge University Press, 2009), 106-107, 135. This approach accepts that if a state takes reasonable steps to protect one group of citizens from severe harms inflicted by some other group of citizens, but for one or another unexpected reason it fails to sufficiently protect them, no persecution can be said to occur. In his analysis, Price refers to Rawls’ distinction between burdened societies and outlaw states, and suggests that persons facing severe harms from other agents in burdened societies are not persecuted. He argues that the term persecution is inapposite to describe the situation of those needing assistance in burdened societies. This, on his view, is essentially because to grant asylum in such cases would be to issue a condemnation where none is warranted. Price, *Rethinking Asylum*, 72-73.

in order for the harms to amount to persecution. The ‘statist’ approach to the concept of refugee has been fairly common in the aftermath of the Second World War.¹⁶⁷ Many states have interpreted the Convention in a narrow sense, and for example the German law on asylum that predates 1st of January 2005 recognises as persecution only acts that either emanate from the state, are attributable to the state, or emanate from a quasi/state-like organisation.¹⁶⁸ One reason why within the framework of refugee jurisprudence there has been a prolonged debate on the appropriate interpretation of the term persecution is that the concept is not substantively clarified in the Convention. The notion of persecution in the Convention is qualified only by the existing motives, and there is no expressed limitation on what is its appropriate source.¹⁶⁹ The term persecution was transferred to the Convention from previous international refugee documents without discussion on its substantive meaning.¹⁷⁰

The prescriptive definition of the refugee outlined in the Convention can be understood as being ‘narrow’ on the hand and ‘broad’ on the other hand. While it limits the eligibility for asylum to those facing a well-founded fear of persecution for the reasons outlined in the Convention, it does not specify more closely what exactly are the circumstances under which persecution can occur. During the Cold War the

¹⁶⁷ It should be pointed out, however, that this approach is not compatible with the approach taken by the UNHCR handbook, which is presented as a guideline to interpreting the Convention. The existing UNHCR handbook states that while ‘persecution is normally related to action by the authorities of a country’, it can also ‘emanate from sections of the population that do not respect the standards established by the laws of the country concerned’. The handbook recognises that ‘where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection’. UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, 1979, HCR/IP/4/Eng/REV.1.

¹⁶⁸ Juss, *International Migration and Global Justice*, 117; Reinhard Marx, ‘The Notion of Persecution by Non-State Agents in German Jurisprudence’, *Georgetown Immigration Law Journal*, 417 (2000), 447-462.

¹⁶⁹ The *non-refoulement* requirement outlined in Article 33 (1) of the Convention may be argued to support the conclusion that within the Convention paradigm persecution can occur in societies in which the infliction of severe harms are not linkable to an existing government. There is no mention of the role of state in the *non-refoulement* requirement, only of the ‘territories’ where persons may be persecuted. Walter Kälin, ‘Non-State Agents of Persecution and the Inability of the State to Protect’, *Georgetown Immigration Law Journal*, 415 (2000), 418.

¹⁷⁰ Jackson, ‘The 1951 Convention relating to the Status of Refugees: A Universal Basis for Protection’, 405-406. Some legal theorists, for example Jacqueline Bhabha, have argued that ‘persecution’ does not constitute a well-circumscribed legal concept at all. Jacqueline Bhabha, ‘International Gatekeepers?: The Tension Between Asylum Advocacy and Human Rights’, *Harvard Human Rights Journal*, 15 (2002), 168.

Convention definition of refugee provided to Western states a convenient and sufficiently flexible political instrument that allowed them to selectively grant asylum to persons of their choice. Many Western governments have strongly held on to the stance that the institution of asylum should express political values, communicate condemnation of certain governments, and serve as an instrument of a broader political program aiming to reform the condemned governments.¹⁷¹ This view has also had an impact on determining the scope of those who are eligible for asylum. States have resorted to ideological interpretations of the Convention definition, and the instrumental requirements of states have constituted a procrustean bed for its more specific interpretation. Put differently, the substantive interpretation of the prescriptive account of refugee has been formulated by many states to fit a desired ideological function.

The prescriptive definition of refugee outlined in the Convention was broad enough to cover the victims of Nazism, and it also allowed the Western states to take a ‘moral high-ground’ against the existing Communist regimes by offering protection to persons whose flight from Communist countries was motivated by pro-Western political values.¹⁷² Western states systematically interpreted asylum applicants from Communist countries as being persecuted by their governments, and they used the institution of asylum for political purposes. While considering asylum as an instrument of humanitarian assistance, they effectively limited its use to cases in which the humanitarian aim could simultaneously serve a foreign policy aim.¹⁷³ The intention was to use asylum as an instrument in the long-term political goal of overthrowing governments the Western states considered as their political

¹⁷¹ Price, *Rethinking Asylum*, ch. 2.

¹⁷² Juss, *International Migration and Global Justice*, 202.

¹⁷³ The United States’ asylum policies during the Cold War provide a clear example of foreign policy aims and the politicised nature of asylum in the post-Second World War era. In 1952 the US Attorney General was granted the power to ‘parole’ non-citizens temporarily to the country ‘for emergency reasons or for reasons deemed strictly in the public interest’. The statistical data from the time shows that the primary reason for paroling a non-citizen was ‘public interest’, and that the parole was used almost exclusively to grant entry to those arriving from the Communist countries. Between the years 1952 and 1968 of the 232,111 persons paroled into the United States only 925 came from non-Communist countries, and the rest came from countries such as the USSR, Cuba, and Hungary. See Arthur C. Helton, ‘Political Asylum under the 1980 Refugee Act: An unfulfilled Promise’, *University of Michigan Journal of Law Reform*, 17 (1984), 245-246.

enemies.¹⁷⁴ Simultaneously, the Convention definition was carefully drafted in such a way that it could not be turned to the political advantage of the Soviet bloc.¹⁷⁵ In the post-Second World War context, a broader definition of refugee would not only have meant the expansion of the scope of obligations to foreign nationals, but it would also have threatened the use of the Convention as an instrument of Western countries' foreign policy aims.

After the end of the Cold War it has become increasingly questionable whether the institution of asylum the function of which is to condemn other regimes serves as an important instrument for any existing state. There seems to be no longer a direct foreign policy rationale for holding on to such approach, as the ideological struggles existing during the Cold War have been replaced with other pressing issues, including the threat of terrorism and increasingly unstable national governments in countries with important natural resources. Many have argued that instead of manifesting political values asylum should be kept as a politically neutral institution.¹⁷⁶ James Hathaway, among others, claims that there is an urgent need to reinterpret the Convention in order for it to amount to more than a 'mere anachronism' of the post-Second World War circumstances where ideological battles heavily influenced the form of the emerging international institutions.¹⁷⁷ On his view, the Convention should be reinterpreted in such a way that it is 'consonant with modern political realities'.¹⁷⁸ Hathaway suggests that we should abandon the foreign

¹⁷⁴ Price, *Rethinking Asylum*, 86.

¹⁷⁵ Hathaway, *The Law of Refugee Status*, 6-8.

¹⁷⁶ In words of Michael Dummett, 'if people are justifiably in fear of their lives, they deserve to be offered safety, whether those they are afraid will kill them are Algerian police or Islamic rebels, the Sri Lankan army or Tamil Tigers'. Michael Dummett, *On Migration and Refugees* (London and New York: Routledge, 2001), 37.

¹⁷⁷ In *The Law of Refugee Status* Hathaway argues that all humanly caused severe harm that is within the scope of the basic duty of protection owed by a state to its citizens should be considered as part of 'persecution'. He argues that 'persecution may be defined as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection'. James C. Hathaway, *The Law of Refugee Status* (Vancouver: Butterworths, 1991), 104-105.

¹⁷⁸ Hathaway, *The Law of Refugee Status*, 101-104. In many burdened societies there are groups that are hostile to each other, these groups are of asymmetrical power, and the more dominant groups have found ways to create a general climate of fear among the less powerful groups and have effectively caused severe harm to persons within the group they have singled out. This all has taken place without any existing and functioning government condoning the actions of the dominant group. We do not have to go further than Afghanistan and Somalia to recognise this reality. In the countryside of Afghanistan, which is beyond the control of the weak central government in Kabul, many women and gays are facing gruesome treatment without the involvement or oversight of state agents. The same is

policy approach to asylum, and argues that the Convention definition should be interpreted in such a way that it allows ‘governments to conceive refugee protection as a humanitarian act which ought not to be a cause of tension between states’.¹⁷⁹

Subsequent regional treaties have moved to outline alternative prescriptive accounts of the refugee, and they have suggested that the Convention definition is not representative of the *de facto* problem of forced migration.¹⁸⁰ One regional treaty that includes a more extensive prescriptive account of refugee than the Convention is the Cartagena Declaration on Refugees (Cartagena Declaration) crafted by ten Latin American States in 1985. The state parties involved expanded with the Cartagena Declaration the definition of refugee to all persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order.

An even broader definition of refugee can be found in The Organisation of African Unity’s (OAU) regional refugee treaty.¹⁸¹ Following the Convention, in 1969 the OAU outlined its own complementary regional treaty on refugee protection. The OAU treaty, Convention Governing the Specific Aspects of Refugee Problems in Africa, includes a definition of refugee that applies to all persons who are compelled to leave their home in order to seek refuge outside their country of nationality ‘owing to external aggression, occupation, foreign domination or events seriously disturbing

the case also for example with many Christians in Somalia, who desperately seek shelter in the neighbouring countries from the non-governmental Islamic militants specifically targeting them because of their faith.

¹⁷⁹ Hathaway, *The Law of Refugee Status*, 101.

¹⁸⁰ In addition to the Cartagena Declaration and the OAU convention, many countries have drafted their national law in such a way that it includes a commitment to the protection of foreign persons beyond those covered by the Convention definition. For examples of national law extending protection of persons beyond the Convention, see Hathaway, *The Law of Refugee Status*, 22.

¹⁸¹ One of the central ways in which the OAU convention extends beyond the Cartagena Declaration is that it recognises the disturbances of public order ‘in either part or the whole of his country of origin or nationality’. On this view, a person may be considered as refugee even if in principle there might be protection available in some other part of the person’s home country. This view recognises the reality that underdeveloped infrastructure and the limited resources of the fleeing persons may limit the meaningful options for seeking humanitarian protection. As well, it reflects the reality that while at the moment some other part of the country may be safe, it may not necessarily be safe tomorrow. Hathaway, *The Law of Refugee Status*, 18-19.

public order in either part or the whole of his country of origin or nationality'.¹⁸² As with the Cartagena Declaration, the OAU definition leaves the cause of the harm indeterminate, and it is focused primarily on the gravity of disturbances in the public order rather than on the motives of the flight.¹⁸³

In other words, there exists a political controversy regarding the prescriptive definition of the refugee, and the Convention definition has not been accepted unquestionably as an element of the global refugee regime. Many additional international instruments that recognise a broader scope of persons eligible for protection than the Convention have since been ratified.

Political philosophy offers us one way to cut through the political controversies in the analysis of the prescriptive concept of refugee. When framed as an issue of political philosophy, the question regarding the prescriptive concept of refugee is centrally about whether there is a universal entitlement to be provided protection by the international community in other states in certain circumstances of deprivation, and about the specific conditions under which a person may be said to bear this entitlement. Put differently, the fact that it may have been politically expedient for Western states to exclude socioeconomic reasons, civil wars, generalised violence, and other severe disturbances of public order from the reasons why a person can be eligible for asylum does not directly validate the prescriptive concept of refugee from the perspective of justice. The politically controversial question regarding the final scope of persons who should be considered to be eligible for asylum is linked to an underlying more fundamental moral question: 'under what circumstances of

¹⁸² OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted September 10, 1969 (UNTS no. 14691), Art. 1(2).

¹⁸³ In addition, the current mandate of the UNHCR extends beyond the Convention refugees. The UNHCR, which had already been established before the Convention was drafted, was initially given a three-year mandate to oversee the implementation of the Convention. It was expected to disband once the European refugee problem was solved, but its mandate was eventually extended. The UNHCR has gradually become an indispensable instrument of protection in the existing global refugee regime. Currently, the UNHCR has the authority to act on behalf of all 'persons of concern'. This category includes refugees under the 1951 Convention, persons who have been forced to leave their countries as a result of conflict or events seriously disturbing public order, returnees, stateless persons, and, in some situations, internally displaced persons. In other words, it may be said that the central mediating institution that was originally set up in the global refugee regime to monitor the implementation of the Convention has 'grown beyond' the Convention.

deprivation – if any – do citizens of one state have an obligation of justice to provide asylum to citizens of other states?’

The legitimacy of the global refugee regime is dependent on the validity of the moral underpinnings of the regime, and the underpinnings need to be examined separately from the political and historical processes that have led to the regime to receiving its particular form. In the first two chapters of the work, I outlined an account of the moral right to asylum. I suggested that all persons whose right to necessities is insufficiently protected in their home states have the right to asylum when they cannot be assisted with other remedial instruments by the international community within a reasonable timeframe. I argued that this right may be understood as a universal entitlement of all persons, and that it can ground obligation of justice in persons with the capacity to assist. The moral right to asylum allows us to propose a prescriptive account of refugee that is not dependent on such ‘non-moral’ factors as political power, i.e., it offers a justification for a particular definition of refugee on universalist moral grounds. On this universalist moral approach, the prescriptive account of the refugee is co-extensive with the group of persons with the right to asylum: all persons who have the moral right to asylum should be considered as ‘refugees eligible for asylum’.

On the grounds of the right to asylum it can be argued that the prescriptive definition of refugee offered by the Convention is insufficiently broad. The Convention definition fails to recognise adequately the myriad of circumstances beyond ‘a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion’ where a person’s right to necessities is threatened in the right-bearer’s home country, and where asylum offers the only meaningful remedy. There is a need to go beyond the particular reasons why the right to necessities is insufficiently protected, and to examine the broader context in which a person is in need of assistance from the international community. Whether the bearers of the right to necessities are in need of asylum or not is heavily dependent on the surrounding circumstances, and all the possible

contextual circumstances in which this can be the case are not satisfactorily covered by the Convention definition.

Furthermore, on the grounds of the moral right to asylum it can be argued that the existing institutional framework of refugee protection should be replaced with a morally satisfactory alternative, i.e., the existing refugee regime, which is the result of *realpolitik*, should be replaced with a 'moral refugee regime'. A moral refugee regime may be understood as an institutional alternative that grounds itself into demands of justice instead of political influence and national interests. In the existing refugee regime a central reason for the reluctance to extend protection beyond those with a well-founded fear of persecution is the political rift between self-interested states. From the perspective of justice this does not constitute a satisfactory reason for the form of the current refugee regime.

The replacement of the current 'political refugee regime' with a moral refugee regime is a requirement of justice that imposes obligations on citizens of all states. One central aspect of a moral refugee regime is that it assigns the prescriptive status of refugee to all persons with the moral right to asylum. Put differently, the moral refugee regime recognises explicitly the plurality of reasons why persons may be in need of asylum, and it does not limit protection to those with a well-founded fear of persecution.¹⁸⁴ In order for the global refugee regime to be a just regime, genuine steps need to be taken to extend protection to all bearers of the right to asylum. It is not enough for states to appeal to their national interests when considering what exactly should be the particular form of the global refugee regime.

¹⁸⁴ This conclusion does not necessarily mean that those with a well-founded fear of persecution could not necessarily be recognised as a distinct class of persons in a moral refugee regime. As Joseph Carens rightly points out, 'it could be justifiable to have two or more legally relevant definitions' of the term 'refugee'. This is the case centrally because from a moral perspective, a line might be drawn to 'separate those with stronger moral claims to asylum from those with weaker moral claims'. See also Joseph Carens, 'The Philosopher and the Policymaker: Two Perspectives on the Ethics of Immigration with Special Attention to the Problem of Restricting Asylum', in Martin Hailbrunner, David A. Martin and Hiroshi Motomura (eds.), *Immigration Admissions* (New York: Berghahn Books, 1997), 14-17. It does mean, however, that in a moral refugee regime those with well-founded fear of persecution do not have exclusive entitlement to asylum.

For the remainder of the current study, I will use the term ‘refugee’ synonymously with the term ‘bearers of the moral right to asylum’, and the term ‘Convention refugee’ to refer to the group of persons eligible for protection under the Convention. In other words, the term ‘refugee’ is used in the following enquiry in a moral sense rather than in a political sense. Refugees are bearers of the right to necessities who are facing insufficient protection of their right in their home country and who cannot be helped by the international community with any other remedial instrument than asylum within a reasonable timeframe.

4.3 The *non-refoulement* principle as the central mechanism of protection

Apart from recognising a limited prescriptive account of refugee, another central characteristic of the existing global refugee regime is the absence of positive obligations on states to provide asylum. The existing global refugee regime does not recognise binding obligations on any state to grant asylum to any persons, regardless of the severity of the harms to which they are seeking remedy. The drafting process of Article 14 exemplifies how the global refugee regime has received its present non-binding form. When Article 14 of the UDHR was drafted, many states rejected the position that there is a moral obligation to grant asylum to any persons, let alone that any possible moral obligation should be formulated into a legal obligation. The original draft of Article 14 included the language ‘be granted asylum’, but it was finally settled into the form ‘seek and to enjoy asylum’. In the drafting process there were tensions between representatives defending state sovereignty and those who argued for stronger obligations towards Convention refugees. Eventually the advocates of state sovereignty prevailed, and the UDHR right to asylum received the form of a ‘right of states to grant asylum’.¹⁸⁵

In other words, as with the prescriptive definition of refugee, also the form of protection offered is strongly dictated by self-interested states worrying about the erosion of their sovereignty. This entails that the instruments of protection

¹⁸⁵ Jane MacAdam, ‘Asylum and the Universal Declaration of Human Rights’, *Refugee Survey Quarterly*, 27 (2008), 4-5.

established in the existing global refugee regime have primarily received their current form due to national interests rather than moral requirements following the moral right to asylum. The current global refugee regime accepts as overriding the state sovereignty principle of customary international law, according to which states are free to decide on their own matters as long as they do not violate rights of other states. In the words of Emma Haddad, in international law ‘the right of states to grant asylum takes precedence over the right of individuals’ to receive it.¹⁸⁶ International refugee law allows states to consider autonomously whether or not (and to what extent) they will provide assistance and protection to Convention refugees and to persons who do not satisfy the necessary and sufficient conditions of the Convention definition. If the claims of a person seeking asylum are deemed valid by a state, and if the state holds that it ought to assist the needy foreigner, the state may grant asylum to the applicant.

The absence of direct positive obligations to grant asylum does not mean that there are no meaningful protective instruments at all in the current global refugee regime. The central legal instrument with any teeth is the *non-refoulement* principle. In philosophical terms, the *non-refoulement* obligation is founded on the moral imperative ‘one should not actively cause harm to others’.¹⁸⁷ The *non-refoulement* principle sets minimum standards of justice in the expulsion of non-citizens from the territory of a state, and one of the international treaties it is outlined in is the Convention. Article 33 of the Convention states that ‘no contracting state shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened’. Put differently, the *non-refoulement* principle is supposed to guarantee *de facto* protection to persons facing threats to their life and liberty in their home states even if a state is unwilling to grant asylum.

¹⁸⁶ Emma Haddad, *The Refugee in International Society – Between Sovereigns* (Cambridge: Cambridge University Press, 2008), 79.

¹⁸⁷ The negative duty not to harm is often considered as the most stringent moral duty. In his enquiry on asylum, Walzer gives a historical example of a flagrant violation of this duty in the context of international migration. He argues that after the Second World War the Allies violated the duty not to harm by sending thousands of Russians that had been captured by the Nazis back to Russia where they were immediately shot or sent on to die in labour camps. Walzer, *Spheres of Justice*, 51.

When the Convention was drafted, the original intention was to formulate an absolute *non-refoulement* requirement for states, but the participating states were afraid that such a principle would excessively undermine their sovereignty. The final version of the Convention principle of *non-refoulement* was watered down, as eventually a second paragraph that contains a national security and public safety proviso was included. This proviso recognises that the *non-refoulement* benefit may not be claimed by a person whom there are reasonable grounds for regarding as a danger to the security of the country in which he is. Apart from the right to *refouler* persons when they, for one reason or another, impose a danger to national security or to the public safety of a country, there are other controversies with regard to the obligation of *non-refoulement*. For example, as the issue is not specified further in the Convention, there is a debate on what exactly constitutes circumstances of being 'inside' a state, i.e., whether the *non-refoulement* obligation allows that states may return those persons encountered in such places as for example on the seas.¹⁸⁸

In addition to the Convention, there are also other treaties of international law that set obligations of *non-refoulement* to states. For example, the 1984 United Nations Convention Against Torture, the 1966 International Covenant on Civil and Political Rights, and the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms each recognise the *non-refoulement* obligation of states to persons who upon arrival are in danger of being subjected to torture or to cruel, inhuman or degrading treatment or punishment.¹⁸⁹

¹⁸⁸ Also, there remains a controversy on whether the obligation of *non-refoulement* extends only to those who are eligible for assistance and protection under the Convention. Some legal theorists suggest that the *non-refoulement* principle has emerged to be a principle of customary international law that extends beyond the Convention refugees. Others, however, reject this conclusion as 'wishful legal thinking'. For a defence of an extended legal *non-refoulement* obligation see Guy S. Goodwin-Gill, 'Non-Refoulement and the New Asylum Seekers', *Virginia Journal of international Law*, 26 (1986), 901-902. For criticism of this position, see Kay Hailbronner, 'Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?', *Virginia Journal of International Law*, 26 (1986), 858.

¹⁸⁹ Elihu Lauterpacht & Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion', in Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law – UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), 92.

But as the legal duties of *non-refoulement* arise only when persons have been able to successfully access a state's jurisdiction, the *non-refoulement* principle has a limited function as an instrument of protection. Some migration experts have suggested that the convergence of interest between asylum seekers and the developed Western countries has disappeared after the end of Cold War, and as a consequence these countries are increasingly seeking to avoid the arrival of asylum seekers by adopting policies of external deterrence.¹⁹⁰ A common strategy to avoid becoming the assigned bearer of responsibility towards non-citizens' protection is the implementation of *non-entrée* practices. Many states have, among other things, implemented strict visa requirements, penalised carriers of unauthorised asylum seekers, created 'international zones' to airports, and pressured governments in the countries of departure to limit the flow of asylum seekers towards their territories. The only constraint imposed on this rationalising strategy is the pressure mounted from domestic advocates, international human rights organisations such as the UNHCR and Amnesty International, and other states.¹⁹¹

Furthermore, even if a *bona fide* refugee manages to enter a state's jurisdiction, in the current institutional framework the state may still resort to actions other than processing asylum claims and providing protection. Consider three examples. Firstly, within the European Union, states may return asylum applicants to the 'first country of arrival' in accordance with The European Union's Dublin II regulation. The Dublin II regulation recognises countries that are primarily responsible for considering the validity of asylum claimants' application, and generally these countries are the first countries of arrival within the European Union. This means that if persons are applying for asylum in a country other than the country they first entered when arriving in the Union, they can be sent back to the first-entrance country for processing. Secondly, states may attempt to avoid having to grant asylum to persons to whom the *non-refoulement* obligation applies by transferring them to what is determined by the state as a 'safe third country'. This practice is aggressively

¹⁹⁰ James C. Hathaway & Alexander Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection', *Harvard Human Rights Journal*, 10 (1997), 119-120.

¹⁹¹ Peter H. Schuck, 'Refugee Burden-Sharing: A Modest Proposal', *Yale Journal of International Law*, 22 (1997), 253.

pursued for example by Australia.¹⁹² The policy of returning asylum seekers to safe third countries has been criticised as dubious due to the possibility of indirect *refoulement*. If the safe third country is not a party to the Convention, this raises questions about the possible outsourcing of human rights violations.¹⁹³ Finally, states may coercively attempt to get asylum seekers to accept ‘voluntary repatriation’, which *de facto* can amount to *refoulement*, but nevertheless may be interpreted to stop short of constituting a violation of the Convention obligation of *non-refoulement*. States may intentionally arrange the circumstances for arriving asylum seekers in such a way that they have no other meaningful choice but to return to their state of origin or to some other state where the circumstances are no better. Such practices have been used for example by Turkey, Rwanda, Uganda, and India, which have withheld food and other essentials to ‘incentivise’ the repatriation of asylum seekers after their initial arrival.¹⁹⁴

What should we make of the *non-refoulement* principle as the central mechanism of protecting refugees? From the perspective of the theory of asylum outlined in the previous chapters, there are two central problems with the *non-refoulement* principle. Firstly, the application of the *non-refoulement* principle as the primary mechanism of protection entails that access to asylum is excessively dependent on luck and the benevolence of the territorial states persons seek to enter. Lucky asylum applicants are able to break through the many obstacles set by states aiming to prevent asylum seekers from entering their jurisdictional territories. But even the lucky applicants who manage to access a state and file a claim for asylum have only managed to come half way in their aim to remedy the harms they are fleeing from. Once a person is in a position to file a claim for asylum, it is still centrally up to the state to decide autonomously how to respond to the claim.

The moral right to asylum allows us to argue that *non-entrée* practices and coercive repatriation of asylum seekers existing in the current global refugee regime are

¹⁹² James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005), 327-328.

¹⁹³ Hathaway, *The Rights of Refugees under International Law*, 328.

¹⁹⁴ Hathaway, *The Rights of Refugees under International Law*, 318.

unjust. States resorting to these practices fail to consider that asylum seekers may be legitimate refugees with the right to asylum. States attempting to keep asylum seekers away or repatriate them before the legitimacy of their claims have been examined are effectively failing to take reasonable steps to find out whether they do or do not have binding obligations of justice towards the persons they encounter. These policies may be attractive to the policy-maker because they are inexpensive, but this does not change the fact that the policies are unjust. Furthermore, the existing refugee regime fails to adequately recognise that the *non-refoulement* principle can leave the right-bearers in an extremely weak position with regard to the claimability of their rights, and that the right to asylum can ground not only duties of respect but also binding duties of assistance and duties of establishing interstate mediating institutions that enforce compliance in its protection. Put differently, the moral right to asylum constitutes a justificatory ground for a global refugee regime that extends beyond the *non-refoulement* principle and enforces positive obligations on citizens of all states with the capacity to assist the right-bearers. In such a regime the role of luck and the benevolence of states as reasons why persons have or do not have access to their universal entitlements are minimised.

The second central problem in a global refugee regime in which the *non-refoulement* principle constitutes the central mechanism of protection is burden-distribution between duty-bearers. In the current refugee regime the protection of persons fleeing their home states and the distribution of burdens between the recipient states is centrally organised in the following way: there is a set of maxims (international law) that assigns a responsibility role (*non-refoulement*) to each state in the global collective of states. As long as states follow the *non-refoulement* obligation they satisfactorily comply with the existing maxims of protection. This entails that in the existing refugee regime asylum claims filed on the territory of one state effectively release other states from obligations of protection. States only have *non-refoulement* obligations to asylum seekers, but no obligation to share burdens of protection with other states regardless of the relative levels of refugee accommodation. This means that the first-asylum states may find themselves in situations where no other state is

willing to share their burdens, and where they cannot deport persons back to their home countries due to the existing *non-refoulement* obligation.

In recent decades, there has been an increasing political debate on the distribution of burdens in the protection of foreign nationals. Especially in the European Union, burden-sharing has been given serious consideration. The issue started to emerge in the 1990s during the Yugoslavian crisis, and it was further facilitated by the adoption of the European Union's Amsterdam Treaty of 1997. The treaty explicitly recognised the need to adopt measures 'promoting a balance of effort between EU Member States in receiving and bearing the consequences of receiving refugees and displaced persons'.¹⁹⁵ The next decade, however, brought with it an atmosphere of disappointment. While some measures advancing burden-sharing were introduced, simultaneously such counter-productive measures as the Dublin II regulation were implemented. Additionally, regardless of the emerging political debate on the topic within EU, there are currently no meaningful efforts to establish a global or even a regional burden-sharing scheme. The *non-refoulement* principle still maintains its position as the central mechanism for distributing burdens of protection between countries.

In a global regime founded on the *non-refoulement* principle, apart from lucky and unlucky bearers of the right to asylum there can be unlucky states that face floods of right-bearers seeking entry. These unlucky states can end up being forced by circumstances to protect a great number of needy foreigners. In addition, there can be 'lucky' states which are able to avoid circumstances in which they are forced to provide protection to foreign nationals, or they are able to avoid coming under a *non-refoulement* obligation in the first place. As Matthew Gibney rightly notes, the

¹⁹⁵ Eiko Thielemann, 'Between Interests and Norms: Explaining Burden-Sharing in the European Union', *Journal of Refugee Studies*, 16 (2003), 261. This commitment was reaffirmed for example in the European council meeting in 2004. In the meeting EU leaders declared their commitment to common asylum policies that 'should be based on solidarity and fair sharing of responsibility including its financial implications and closer practical co-operation between member states'. European Council, 4/5 November 2004, Presidency Conclusions, 18. Available online: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/82534.pdf (accessed 19.07.2011).

central distributive logic in the *non-refoulement* principle is proximity.¹⁹⁶ Migratory movement of substantial magnitude during humanitarian crises suggests that the initial aim of those fleeing from harm is to exit from their home country to any place of safety, and often the first country of arrival is a neighbouring country. In such humanitarian crises as the Rwandan crisis or the Afghan crisis the neighbouring countries, including Tanzania, Uganda, Zaire, Pakistan, Iran, and Syria have encountered a vast amount of asylum seekers on their borders.¹⁹⁷ In the current world, many of the unlucky states are primarily developing countries located next to other developing countries. In 2009, the developing countries were hosting 8.3 million Convention refugees, amounting to 80 per cent of all the Convention refugees.¹⁹⁸

The existing global refugee regime may be argued to be unjust because self-interested states have pushed for the adoption of the *non-refoulement* principle as the central mechanism of burden distribution. The regime does not guarantee in any way that the distribution of burdens in the protection of refugees follows considerations of justice. Duty-bearing citizens in states neighbouring humanitarian crises can reasonably ask: ‘is it fair that we are obligated to bear all the burdens in the protection of the right-bearers?’ After all, as in many cases bearers of the right to asylum can migrate to other states from the first-asylum state, and as compensations can be made between states, it is not inevitable that all the burdens of protection fall on the citizens of the first-asylum state. Shouldn’t the global refugee regime that is perfecting imperfect duties be such that it distributes burdens in such a way that the

¹⁹⁶ Matthew Gibney, ‘Forced Migration, Engineered regionalism, and Justice between States’, in Susan Kneebone & Felicity Rawlings-Sanei (eds.), *New Regionalism and Asylum Seekers: Challenges Ahead* (Oxford: Berghahn Press, 2008), 67.

¹⁹⁷ In 2009, the country hosting most Convention refugees was Pakistan with 1.7 million refugees. The next two were Iran with 1.1 million and Syria with 1.05 million refugees. Tanzania was the largest refugee hosting country between 1997 and 2007. Overall, figures in the United Republic of Tanzania have gone down by 83 per cent since 2002, when the country was host to close to 700,000 refugees. This decrease is due to both naturalisation and repatriation of refugees. UNHCR, *Global Trends 2009*, 7-8. Available online: <http://www.unhcr.org/4c11f0be9.html> (accessed 19.07.11).

¹⁹⁸ UNHCR, *Global Trends 2009*, 6. Available online: <http://www.unhcr.org/4c11f0be9.html> (accessed 19.07.11). Some states can be unlucky also in the sense that they are considered by asylum seekers as more appealing places than other states. For example, the wealthy Western countries are considered by many as appealing places for asylum due to the general living standards and opportunities build one’s life. Yet, as the previous statistical facts regarding the distribution of Convention refugees between developed and developing countries show, this is far less decisive factor in the distribution of burdens than proximity to humanitarian crises.

influence geographical location and the capacity to divert refugee flows to other states is minimised? If this conclusion is correct, it allows us to call for the replacement of the existing refugee protective institutions on moral grounds. There is a need to restructure the existing refugee protective institutions in such a way that the burdens are distributed on the grounds of justice rather than with the application of the *non-refoulement* principle. A convenient location and capacities to divert refugee flows to other countries should not have – if possible – any practical impact on the amount of burdens a state comprising bearers of imperfect duties is required to bear in global protection of the right to asylum.

Conclusion

In the current chapter, I have focused on examining the existing global refugee regime from the perspective of the theory of asylum outlined in the previous chapters. The central argument of the chapter was that the existing refugee regime is morally unsatisfactory on several grounds, and it needs to be restructured. I started by explaining the historical process that led the global refugee regime to receive its current form. Then, I focused on the controversies regarding the scope of persons who should be considered as refugees eligible for asylum. I claimed that in a moral refugee regime the prescriptive definition of refugee is coextensive with the scope of persons with the moral claim to asylum. Put differently, a call can be made for restructuring the existing refugee regime in such a way that it extends protection to all persons with the right to asylum. I also examined the *non-refoulement* principle more closely. The *non-refoulement* principle constitutes not only the primary mechanism of protection in the existing global refugee regime, but also the primary mechanism of burden distribution. I argued that if the theory outlined in the previous chapters is correct, the *non-refoulement* principle should be abandoned as the central mechanism of refugee protection and burden distribution. This is due to two central reasons. The *non-refoulement* principle does not adequately recognise that citizens of all states with the capacity to assist have binding moral obligations to assist refugees, and it distributes the burdens of physical accommodation centrally in accordance to geographical proximity to humanitarian crises rather than on the grounds of justice.

5. The ethics of tradable refugee quotas

So far I have argued that under certain circumstances of deprivation citizens of all states can have the moral right to asylum, and that the current global refugee regime dedicated to the protection of Convention refugees recognises this right unsatisfactorily. At this point, it is time to move to examine institutional alternatives to the existing global refugee regime. What kind of mediating institutions dedicated to the protection of the right to asylum should be established between territorial states? Put differently, what should be the more tangible form of the ‘moral refugee regime’, and how should the imperfect duties corresponding the right to asylum be perfected between states comprising bearers of imperfect duties? In the current chapter, I will focus on examining more closely a policy proposal that may be said to offer an alternative to the existing unsatisfactory refugee regime. The policy proposal I will focus on is called the ‘tradable quota scheme’. Many migration experts have taken a strongly critical stance towards the idea of tradable quotas in the context of refugee protection. There have been two separate lines of criticism that have been outlined against the scheme. The first is related to its practical dimensions. Some critics have suggested that there is no realistic chance of implementing a tradable quota scheme.¹⁹⁹ Apart from the practical criticism, critics have argued that the establishment of the tradable quota scheme faces several insurmountable moral problems, and that we are better off looking elsewhere for institutionalising the right to asylum. Here, I will focus on the second line of criticism against the scheme.

I will proceed with the chapter in the following way. Firstly, I will provide an account of the general characteristics of the tradable quota scheme. I will suggest that the scheme may be understood as a synthesis of two stand-alone institutional schemes. Then, I will proceed to examine three moral objections against the scheme. I will claim that none of the examined objections constitute an insurmountable moral

¹⁹⁹ See for example, Deborah Anker, & James Fitzpatrick & Andrew Schacknove, ‘Crisis and Cure: A Reply to Hathaway/Neve and Schuck’, *Harvard Human Rights Journal*, 11 (1998), 295-310. It should be pointed out that a preliminary regional market scheme existed to resettle Convention refugees displaced by the Vietnam War. From 1979 until 1989 over 1.7 million Indochinese Convention refugees were resettled under the process. Schuck, ‘Refugee Burden-Sharing’, 254-259. See also Suhrke, ‘Burden-Sharing during Refugee Emergencies’, 405-406.

obstacle to the tradable quota scheme. Finally, I will turn to examine briefly the tradable quota scheme from a comparative moral perspective. Although I will stop short of conclusively defending the tradable quota scheme as comparatively the most appealing institutional alternative to the existing global refugee regime, I will suggest that there is strong evidence that comparatively the scheme is at the very least as morally appealing if not morally superior to the schemes it derives from.

5.1 Tradable quota scheme – a synthesis

Peter H. Schuck was the first to introduce the idea of a tradable quota scheme in the context of refugee protection.²⁰⁰ Since Schuck's seminal article – titled 'Refugee Burden-Sharing: A Modest Proposal' – other academics have slowly started to pay attention to the idea and to examine whether a tradable migration quota scheme could function as a means for global poverty reduction.²⁰¹ The initial introduction of the scheme is closely related to an emerging academic interest in finding alternatives to the current refugee regime that would more effectively protect Convention refugees and simultaneously distribute the burdens of protection between states in a fairer way than the *non-refoulement* principle. During the 1990s, migration experts increasingly started to call for the replacement of the existing framework of individuated state responsibilities in the protection of Convention refugees with a regime of 'common but differentiated responsibility'.²⁰² The tradable quota scheme was outlined as one

²⁰⁰ Peter H. Schuck, 'Refugee Burden-Sharing: A Modest Proposal', *Yale Journal of International Law*, 22 (1997), 243-297.

²⁰¹ The idea of tradable migration quotas as a mean for global poverty reduction has been considered in David De la Croix & Axel Gosseries, 'Procreation, Migration, and Tradable Quotas', in Robert L. Clark & Andrew Mason & Naohiro Ogawa (eds.), *Population Aging, Intergenerational Transfers and the Macroeconomy* (Cheltenham: Edward Elgar Publishing, 2007); Jesús Fernandez-Huertas Mortaga & Hillel Rapoport, 'Tradable Immigration Quotas', *Institute for the Study of Labor Discussion Papers*. Available online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1867034 (visited 11.08.2011)

²⁰² James C. Hathaway & Alexander Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection'. *Harvard Human Rights Journal*, 10 (1997), 145. In their well-known study on restructuring the existing global refugee regime, Hathaway and Neve defend a collectivised solution-oriented refugee regime. Under a collectivised refugee regime, all states 'agree in advance to contribute to protect refugees who arrive at the territory of any state member of the group'. While Hathaway's and Neve's proposal was framed as a legal proposal, it is broadly compatible with the moral arguments outlined in the current study. For analyses on asylum as a public good see Astri Suhrke, 'Burden-Sharing during Refugee Emergencies: The Logic of Collective versus National Action', *Journal of Refugee Studies*, 11 (1998), 399-403; Alexander Betts, 'Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-Sharing Theory', *Journal of Refugee Studies*, 16 (2003), 275-277.

specific account of a collectivised protection regime. In his article, Schuck focuses on criticising the current refugee regime as outdated and unable to effectively manage flows of Convention refugees, and he outlines the tradable quota scheme as a solution to the existing problems.²⁰³

Schuck formulates his account of the tradable quota scheme essentially as a 'political' instead of moral proposal, and considers that state participation in it should be voluntary.²⁰⁴ This means that his approach to restructuring the existing global refugee regime differs from the approach taken in the current study. As I have argued in the previous chapters, there is a binding obligation of justice on all capable parties to participate in the institutionalisation of the right to asylum. In his work, Schuck formulates a general framework for more specific accounts of tradable quota schemes. Although Schuck calls his proposal 'modest', he is in fact suggesting a fairly radical restructuring of the current refugee regime. There are, of course, many different specific ways to organise a tradable quota scheme, and its final form is partly dependent on the contextual settings to which it has to be accommodated. But there is a set of requirements that may be understood as context-independent common internal components of each more particular scheme. The establishment of a tradable quota scheme requires: 1) a process for determining the number of those in need of protection; 2) an international administrative authority; 3) a market for buying and selling quotas.²⁰⁵

The first two characteristics of the tradable quota scheme constitute a central part of any more comprehensive scheme dedicated to distributing burdens of protecting the right to asylum between states comprising bearers of imperfect duties. In any interstate burden-sharing scheme there is a need to establish a system that determines the status of *bona fide* refugees. There are many more specific ways to establish a system of status determination processes, and it can be either the responsibility of

²⁰³ Schuck, 'Refugee Burden-Sharing', 244-246; 270-289.

²⁰⁴ Schuck argues that 'no state should be obliged to participate in the burden-sharing scheme unless it voluntarily undertakes to do so'. He considers that states have an incentive to enter a tradable quota scheme voluntarily, as it provides an 'insurance policy' for each member state against flows of asylum seekers. Schuck, 'Refugee Burden-Sharing', 273, 276.

²⁰⁵ Schuck, 'Refugee Burden-Sharing', 271.

each state participating in the burden-sharing scheme, or of a global mediating institution. Secondly, without an international overseeing authority that functions between states it is not possible to establish an effectively functioning burden-sharing scheme. An international authority is necessary for the advancement of accountability, compliance, and transparency between states participating in the scheme.²⁰⁶

In his article, Schuck suggests that an international agency similar to the UNHCR might be established to oversee the tradable quota scheme. While the UNHCR currently functions as an agency that assigns refugee status to a number of asylum applicants and also helps to distribute these recognised Convention refugees to what are sometimes called ‘the quota countries’ (being the countries that accept a quota of the UNHCR recognised refugees), its functions could be expanded in the tradable burden-sharing scheme. The established international mediating institution may be said to have four central functions in the implementation of the tradable quota scheme. The first role of the agency is to oversee the refugee status determination processes. There is a need for advancing transparency and trust within the status determination process of each member country through international oversight.²⁰⁷ The second role of the international agency is to oversee that the market functions as it is supposed to. This means at least disseminating information about market transactions.²⁰⁸ The third role of the agency is to oversee that each participating state complies with the requirements of refugee protection that the assigned quota sets for the state, and the fourth role is to function as the mediator in cases of conflict between the member states.

It is centrally the third characteristic – the market for buying and selling quotas – that separates the tradable quota scheme from other burden-sharing schemes. The idea of a tradable quota scheme can be understood as a synthesis of two stand-alone burden-

²⁰⁶ There are, of course, issues of legitimacy that need to be answered in the establishment of an international overseeing authority. But this is an issue that is faced in any comprehensive burden-sharing scheme, and it is in no particular way related to the tradable quota scheme. Thus, I will leave here aside its closer examination.

²⁰⁷ In fact, a case might be made for letting the international agency have control over the status determination processes altogether.

²⁰⁸ Schuck, ‘Refugee Burden-Sharing’, 288.

sharing schemes. The first scheme it includes elements from is called the ‘physical burden-sharing scheme’.²⁰⁹ In the physical burden-sharing scheme refugees are distributed between territorial states in such a way that each state capable of accommodating refugees will have to bear their fair share of the overall physical burden.²¹⁰ Put differently, in the physical burden-sharing scheme fair accommodation quotas are established for each state capable of protecting bearers of the right to asylum. How exactly the quotas should be established in such a way that it is fair for all states capable of accommodating refugees is a fairly complex question. For the purposes of the current chapter, I will assume that fair physical accommodation quotas can be established for each state participating the scheme.²¹¹

The implementation of a physical burden-sharing scheme also requires a collectivised status-determination process. The collectivised status determination process is essentially a system in which asylum seekers apply for asylum from the collective of states constituting the burden-sharing scheme. When an asylum seeker arrives in a particular state and enters the status determination process, she is claiming to be recognised in one of the eventually distributable quotas, and to be one of the persons provided asylum in one of the states that is a member of the scheme.²¹²

²⁰⁹ Physical burden-sharing efforts were made for example during the Yugoslavian war in Europe. See Suhrke, ‘Burden-Sharing during Refugee Emergencies’, 408-412.

²¹⁰ It should be pointed out that there is also a possibility that some states comprising bearers of imperfect duties are not capable of physically accommodating bearers of the right to asylum, but they are nevertheless capable of assisting in the protection of the right-bearers in other ways, say by offering monetary assistance. This entails that in some cases it may be necessary to complement a physical burden-sharing scheme with a compensatory scheme. The complementary compensatory scheme can take a fair amount of resources from the states capable of assisting but not accommodating refugees, and these resources can be used to bring down the overall costs of the physical burden-sharing scheme in a way that is fair to all member states in the scheme.

²¹¹ Many migration experts have suggested that the establishment of fair physical quotas between countries starts from such criteria as national wealth and population density. On the establishment of physical accommodation quotas, see also Schuck, ‘Refugee Burden-Sharing’, 279-282; Suhrke, ‘Burden-Sharing during Refugee Emergencies’, 397. Suhrke notes that legal scholars started to outline proposals for burden-sharing in refugee protection during the late 1970’s, and in these proposals population density and national wealth constitutes the central criteria with which shares of burden are determined. It should be pointed out, however, that it seems that also such things as prospective population growth, naturally occurring resources within a territory, landscape, and general climatic conditions are among additional factors that should be taken into consideration in a fair establishment of physical accommodation quotas.

²¹² On the establishment of a collectivised status determination process, see Schuck, ‘Refugee Burden-Sharing’, 277-279.

States engaging in the status-determination of asylum seekers on their territories are not trying to determine whether or not asylum seekers have a valid claim to asylum in that particular country, but instead whether the asylum seekers have a valid claim to be recognised in one of the eventually distributable quotas. In other words, each state is engaging in the refugee status-determination processes on behalf of the collective of states they represent. The implementation of collectivised status-determination processes and the establishment of fair quotas of refugees to each state entails that whatever the outcome of a status determination process in a particular state, the state is not required to physically accommodate all *bona fide* refugees.²¹³ The physical burden-sharing scheme entails a noticeable shift from the current refugee protection regime, as it means the abandonment of the *non-refoulement* principle as the central mechanism with which refugees are distributed between states. While the *non-refoulement* obligation still applies to each state in the physical burden-sharing scheme, it is not the primary mechanism for distributing refugees to their final places of asylum.

The tradable quota scheme takes as its starting-point the physical burden-sharing scheme. The tradable quota scheme aims to provide a comprehensive alternative to the current refugee regime just as the physical burden-sharing scheme does. As in the physical burden-sharing scheme, in the tradable quota scheme states are allocated (fairly established) quotas of refugees which they are obligated to accommodate. Thus, as in the physical burden-sharing scheme also in the tradable quota scheme the country of first asylum is not necessarily the final place for asylum. Instead, refugees claim asylum from the broader collective, and become part of the physical quotas that are allocated between the member states. But there are also important differences in the two schemes. The tradable quota scheme expands from the ‘rigid’ physical burden-sharing scheme, which leaves no options beyond the allocation of refugee quotas. In contrast to the physical burden-sharing scheme, in the tradable quota

²¹³ In order for a quota system to be fair to the recipient states, there is a need to distinguish between temporary and permanent needs of protection. In other words, quotas of refugees who in all likelihood will need a permanent asylum are recognised as one category and the temporary quotas as another category. It should be pointed out that this is not, in the end, an uncomplicated task, as an accurate establishment of the two categories will require not only determining the temporal point after which it is unjust to repatriate an asylum claimant, but also the prospects of a change in circumstances at the country of departure. Schuck, ‘Refugee Burden-Sharing’, 277-278.

scheme the obligations to accommodate refugee quotas may be renegotiated between states after their initial allocation.

This brings us to the second scheme from which the tradable quota scheme contains elements, the ‘compensatory scheme’. As a stand-alone scheme the compensatory scheme includes a more modest shift from the current refugee protection paradigm than the physical burden-sharing scheme or the tradable quota scheme. In the compensatory scheme the primary mechanism of allocating refugees to their final places of asylum is still the *non-refoulement* principle, and the scheme proposes only financial compensations to first asylum states. By its generic structure, the tradable quota scheme may be understood as a ‘compensatory extension’ of the physical burden-sharing scheme. Like the compensatory scheme, the tradable quota scheme allows the possibility of compensation between states. The renegotiation of refugee quotas in the tradable quota scheme essentially means that states can engage with each other in a designated market, and deliberate on the final form of discharging their citizens’ duties. In other words, contrary to the physical burden-sharing scheme, the tradable quota scheme allows states to buy and sell refugee quotas between each other after their initial allocation.²¹⁴ This effectively means that some states can – if willing – accommodate more than the share of refugees they are assigned to under the initial fair allocation. But contrary to the compensatory scheme, a failure to come into an agreement on compensations does not entail a requirement for any state to physically accommodate more than their fair share of refugees. If the trade negotiations do not result in mutual agreements between states, then each participating state is obligated to accommodate the refugee quota that was initially assigned to it through the collectivised status determination process.

²¹⁴ On Schuck’s account the payments in the market take the form of cash, but he also recognises the possibility of expanding the payment options to ‘credit, development assistance, technical advice, weapons, political support, or some combination of these’. Schuck, ‘Refugee Burden-Sharing’, 283-284. The form of payment is in itself a moral issue, which I will not engage with further here.

5.2 The moral dimensions of the tradable quota scheme

But is the attempt to combine the two stand-alone schemes successful from the perspective of justice? Should we accept that the tradable quota scheme constitutes an appealing proposal on the institutionalisation of the moral right to asylum? There are two possible ways to approach the ethical dimensions of the tradable quota scheme. Firstly, the scheme may be examined with respect to its internal components. Whether the scheme can be considered as an appealing burden-sharing proposal depends partly on whether or not some of its internal components are directly at odds with other considerations of justice. If the tradable quota scheme violates some requirements of justice then the proposal is intrinsically flawed and should be abandoned. Some critics of the tradable quota scheme have suggested that this is in fact the case, and that there is no need to look beyond the intrinsic elements of the scheme for its rejection. Apart from the intrinsic qualities of its components, the moral nature of the scheme may be examined from a comparative perspective. On this approach, the final moral appeal of the tradable quota scheme depends on how we rank it in relation to other potential institutional schemes. If we conclude that other schemes are morally more appealing alternatives, this can lead us to reject the tradable quota scheme as the institutional framework of the moral refugee regime.

In the current chapter I will centrally focus on the first approach and proceed in the following way. I will examine three moral objections against the internal components of the scheme. These objections may be called the ‘preference objection’, the ‘dignity objection’, and the ‘exploitation objection’. The first objection suggests that the tradable quota scheme is problematic as it gives insufficient attention to refugees’ desires regarding the final country in which asylum is provided. The second objection claims that the scheme demeans refugees and violates their dignity. The final objection asserts that the scheme will lead to exploitation of the developing countries by the more affluent developed countries. Each of these objections consists of an attempt to show that there is no need to turn to comparative evaluation of the tradable quota scheme as it collapses due to problems in its intrinsic components. I will suggest that none of these objections proves to be detrimental to the scheme.

Finally, I will turn to some considerations regarding the comparative moral appeal of the tradable quota scheme.

5.2.1 The preference objection

One immediate concern that arises in the tradable quota scheme is the attention, or rather the lack of attention, the scheme gives to refugees' desires regarding their final place of asylum. This concern may be formulated into a moral objection against the scheme in the following way: 'As the tradable quota scheme indifferently distributes refugees through market mechanisms to different countries, the scheme treats refugees unjustly'. The preference objection correctly claims that the tradable quota scheme does not give refugees the power of decision over their final locations of asylum. Instead, this will be decided by the initial distribution of physical quotas and the market transactions that may possibly follow. But does this constitute a problem for the scheme? Should we conclude that the scheme treats refugees unjustly when accommodating them into states where they do not necessarily desire to be accommodated?

In the end the preference objection fails to provide sufficiently strong reasons for abandoning the tradable quota scheme. It does not directly follow from the fact that refugees have a desire to be accommodated in particular states that the international community has an obligation of justice to arrange the global refugee regime in such a way that it takes into consideration refugees' desires. The central problem in the preference objection is that it fails to take into consideration exactly what kind of claim the claim to asylum is. As was pointed out in the second chapter, the moral claim to asylum may be understood as a derivative claim which all persons have against the international community at large instead of against any state in particular, and it receives its moral weight from the more fundamental idea of basic needs. In the establishment of the global refugee regime states, which function as representatives of their duty-bearing citizens, may deliberate on how exactly to organise the institutions for the protection the general claim to asylum. All persons with the capacity to assist hold the responsibility of refugee protection jointly and they are collectively entitled to organise the efforts of assistance as they wish on the

condition that the joint effort effectively remedies the existing deprivations of basic needs, and that no other requirements of justice are violated in the process.

A desire-satisfaction may simultaneously entail the satisfaction of a basic need, but does not necessarily do so. Conversely, the satisfaction of a basic need may entail a desire-satisfaction, but this does not necessarily have to be the case.²¹⁵ In other words, while desires and basic needs may coincide, desires can also be manifestations of something less fundamental than basic needs.²¹⁶ The idea of basic needs carries with it much greater general normative force than the idea of desires, as it represents urgent needs of a person regardless of the person's background culture. It is these urgent needs which constitute the justificatory foundation for the moral right to asylum. When refugees have a desire to be accommodated into a particular country, but this desire is not backed with basic needs, it may not be said that they have a claim to be accommodated in their preferred countries.

Desires alone are insufficiently weighty to create a special claim to be accommodated in a particular country. Refugee protection is essentially about satisfying claims to a certain threshold level of well-being, i.e., the level of basic needs, and in this aim desires *qua* desires do not constitute an overriding consideration of justice. If this conclusion is correct, the preference objection fails to show that there is something intrinsically problematic in the components of the tradable quota scheme. Put differently, in order to defend a claim according to which refugees have a moral right to be accommodated in the countries of their preference there is a need to expand the justificatory foundation of the right to asylum to less urgent desires. It would require showing that there is not only a right to the

²¹⁵ See Peter Jones, *Rights* (London: MacMillan, 1994), 149.

²¹⁶ It is worth noting that the disregard of refugees' preferences is not strictly limited to the physical burden-sharing scheme and the tradable quota scheme. In the compensatory scheme, the asylum will be provided by the state which right-bearing asylum seekers are able to reach within the limits of the application of the *non-refoulement* principle. The right-bearers may not be able to reach the state ranking highest on their personal preference, but instead the first-asylum state may be only second-best, third-best, or rank extremely low on the ordering of preference.

protection of basic needs, but also a right to preference satisfaction more generally.²¹⁷

What about the issue of family unification more specifically? Should we consider that bearers of the right to asylum have a claim to be accommodated in a particular country due to the fact that they have immediate family in the country?²¹⁸ The desire to be unified with one's immediate family is surely an important one, but it has not been accepted unquestionably that the need for family unity is fundamental enough to amount to a basic need. A desire to be unified with one's immediate family surely represents a need that may even be considered to be universal, but for example Matthew Gibney claims that any moral claim of a person aiming to be united with their families 'lacks the force – the necessity – that lies behind the claim for entry of the refugee'.²¹⁹

One possible way of tackling the issue of family unification is by attempting to show that it does not fall within the scope of basic needs, and that it therefore does not constitute a problem to the tradable quota scheme. Here, however, I will not try to follow this route of argumentation, as I wish to outline a stronger defence of the tradable quota scheme. For the sake of argument, let us assume that family unity is in fact a basic need, and that there is a strong moral claim for all refugees to be united with their families wherever they are. How would this affect the tradable quota scheme?

To an extent, the matter of family unification can be addressed in the tradable quota scheme. This is the case especially when family members seek to be united within a limited timeframe after the first asylum application, or the initially accommodated

²¹⁷ See also Joseph Carens, 'The Philosopher and the Policymaker: Two Perspectives on the Ethics of Immigration with Special Attention to the Problem of Restricting Asylum', in Martin Hailbronner, David A. Martin and Hiroshi Motomura (eds.), *Immigration Admissions* (New York: Berghahn Books, 1997), 37. Carens rightly points out that 'from a moral perspective, refugees are entitled to safety and basic provisions for their well-being, not a choice of where these needs will be met'.

²¹⁸ Bernard Williams, for example, calls close relationships to others as 'ground projects' that are central to a person's character, integrity, and a flourishing life. Bernard Williams, 'Persons, Character and Morality', in *Moral Luck* (Cambridge: Cambridge University Press, 1981), 1-19.

²¹⁹ Matthew Gibney, *The Ethics and Politics of Asylum – Liberal Democracy and the Response to Refugees* (Cambridge: Cambridge University Press, 2004), 243.

family members have not been accommodated in a country of asylum for a long period of time. It does not seem to be an insurmountable obstacle in the tradable quota scheme to take into consideration in many cases the refugees' desire to be granted asylum in the same state as his or her core family. Core families may be treated in the scheme as unbreakable units that are included in a particular larger quota that is allocated to a particular state. When this is not a possibility, the tradable quota scheme can be complemented with a compensatory scheme. A complementary compensatory scheme can address the circumstances of those persons who cannot be integrated as unbreakable units to a particular larger quota. But it is important to recognise that this concession towards the compensatory scheme does not prove to be detrimental to the tradable quota scheme as a whole. The narrowing of the scope of the tradable quota scheme does not directly show that the scheme's internal components are somehow morally problematic. It only shows that the scope of the scheme has to be limited to particular cases. The tradable quota scheme may still serve as a mediating institution dedicated to advance the protection of the right to asylum.

5.2.2 The dignity objection

The second moral objection against the tradable quota scheme examined here may be called the 'dignity objection'. Matthew Gibney sketches this line of criticism, claiming that the scheme violates refugees' dignity, and therefore it should be rejected as the more specific institutional model of the refugee regime.²²⁰ The idea of dignity has received much focus in debates on human rights, and its historical origins can be traced back to religious debates on the status of man as a creation of God. Some theorists hold that dignity constitutes a source of human rights, whereas others appeal to it as a *telos* of human rights.²²¹ The concept of dignity has also a visible role in many international human rights documents. The UDHR Preamble famously begins with the 'recognition of the inherent dignity and of the equal and inalienable

²²⁰ Matthew Gibney, 'Forced Migration, Engineered regionalism, and Justice between States', in Susan Kneebone & Felicity Rawlings-Sanei (eds.), *New Regionalism and Asylum Seekers: Challenges Ahead* (Oxford: Berghahn Press, 2008), 72-74.

²²¹ On the 'dual' idea of dignity, see Jeremy Waldron, 'Dignity, Rank, and Rights', *Tanner Lectures* (2009), 5. Available online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1461220#%23 (accessed 19.07.11)

rights of all members of the human family’, and the Preamble of the International Covenant on Civil and Political Rights states that the rights recognised in the Covenant ‘derive from the inherent dignity of the human person’.

The other side of the coin is that there is no a single agreed-upon conception of dignity. It is often used as a vague term without further explanation of what exactly it means and whence exactly it derives its value. If appeals to dignity are made without specifying further the idea of ‘inherent dignity of human persons’, it seems that the more specific moral arguments derived from this foundation remain hollow. One way to counter the dignity objection against the tradable quota scheme is to follow the critics who claim that the concept of dignity is too vague to carry any moral weight with it. If the concept on which the objection is founded can be shown to be problematic, then the whole objection may be said to fail. The criticism of dignity as an excessively vague concept is already apparent in Schopenhauer’s writings. In his criticism of Kant’s account of dignity Schopenhauer claims:

‘But that expression, *dignity of man*, once uttered by Kant, afterward became the shibboleth of all the perplexed and empty-headed moralists who concealed behind that imposing expression their lack of any real basis of moral, or at any rate, of one that had any meaning.’²²²

Modern critics of the concept have been most vocal in the context of medical ethics. The central targets of these critics have been the Catholics who appeal to the moral value of dignity when arguing against abortion and stem-cell research. One critic of the moral concept of dignity, Stephen Pinker, contends that ‘dignity is a squishy, subjective notion, hardly up to the heavyweight moral demands assigned to it’.²²³ Another critic, Ruth Mackie, suggests similarly that dignity is a ‘useless’ and ‘hopelessly vague’ concept.²²⁴ While this line of defence of the tradable quota scheme against the dignity objection seems appealing, I will not rely on it being successful. Instead, I wish to outline a stronger defence of the scheme, and claim that

²²² Arthur Schopenhauer, *On the Basic of Morality*, (transl.) E.F.J. Payne (Oxford: Berghahn Books, 1995), 100. The same passage also appears in Christopher MacCruden’s enquiry on the concept of dignity. Christopher MacCruden, ‘Human Dignity and Judicial Interpretation of Human Rights’, *The European Journal of International Law*, 19 (2008), 661.

²²³ Stephen Pinker, ‘Stupidity of Dignity’, *The New Republic*, 238 (2008), 28-31.

²²⁴ Ruth Mackie, ‘Dignity is a useless concept’, *British Medical Journal*, 327 (2003), 1419-1420.

even if we hold that the concept of dignity adds something valuable to the moral debate, the objection nevertheless fails to undermine the moral appeal of the tradable quota scheme.

This way of answering the dignity objection requires clarifying more closely the content of the elusive concept at hand. How should we understand the concept of dignity? Different theorists have outlined numerous competing conceptions of it, and it would be excessively burdensome to examine the normative dimensions of the tradable quota scheme from the perspective of each different conception. In order to tackle the dignity objection on its own terms, I will rely on some generalisations of the concept. Centrally, the idea of ‘inherent dignity of persons’ refers to something that is not acquired through one’s action, but instead is already within a person by virtue of his or her humanity. In other words, a person’s dignity is not dependent on social standing or individual merit.

In a more specific sense dignity might be understood for example as a ‘status’ or ‘rank’. Jeremy Waldron has outlined this type of interpretation of the concept of dignity. In ancient Rome the concept *dignitas* referred to the ‘elevated’ position of a small ruling class. But on Waldron’s view, the ‘rank of dignity’ is something attached intrinsically to each human person: ‘every man is a duke or a queen’, and ‘everyone’s person and body is sacrosanct, in the way that nobles were entitled to deference or in the way that an assault upon the body or the person of a king was regarded as a sacrilege’.²²⁵ Another specific way of understanding the general idea of inherent dignity of persons is to see persons as something ‘non-fungible’. This is for example how dignity seems to appear in Kant’s famous view of it.²²⁶ In *The Groundwork to the Metaphysics of Morals* Kant argues:

²²⁵ Waldron, ‘Dignity, Rank, and Rights’, 30.

²²⁶ On this ‘standard’ interpretation of Kant’s idea of dignity, the concept of dignity refers to a non-relational value of persons. Some theorists, however, are sceptical of this interpretation of Kant, and argue instead that Kant’s concept of dignity should be understood as a ‘relational property’. See Oliver Sensen, ‘Kant’s Conception of Human Dignity’, *Kant-Studien*, 100 (2009), 309-331.

‘In the kingdom of ends everything has either a *price* or a *dignity*. What has a price can be replaced by something else as equivalent. Whatever by contrast is exalted above all price and so admits of no equivalent has a dignity.’²²⁷

With regard to the concept of dignity, Gibney seems to have in mind something similar to the conceptions suggested by Kant and Waldron. Refugees should be accorded a dignified rank of persons, and they should not be treated as commodities. Gibney starts off with a claim according to which the tradable quota scheme is morally objectionable because it attaches negative value to refugees. He contends that trading of refugees entails that they are treated akin to ‘toxic waste’, i.e., as unwanted burden that some states may attempt to avoid by offering monetary compensation to other states. Gibney argues that in the case of waste as well as in the case of tradable refugee quotas ‘the good in question is really a ‘bad’, something possessing a negative value’.²²⁸ This can be interpreted as a claim that the tradable quota scheme treats refugees as something less than their inherent status or rank. Therefore, the scheme violates refugees’ inherent dignity as persons.

It is questionable in the first place that the implementation of the tradable quota scheme entails that refugees are considered to be of negative value. The question here is about the institutionalisation of rights protection, and to recognise refugees as right-bearers means that they are accepted to have certain positive inherent value. But for the sake of argument, let us accept Gibney’s claim, and grant that the tradable quota scheme in fact attaches negative value to refugees. Regardless of this concession, there are strong reasons to be sceptical of the conclusion that the negative valuation of refugees somehow proves to be detrimental to the tradable quota scheme in particular. As far as the claim about negative valuation of refugees is concerned, all burden-sharing schemes stand or fall together. The tradable quota scheme assigns a particular starting quota for each state, and this quota depends on the proportional requirements set for each state. But all burden-sharing schemes start from a similar position. The compensatory scheme as well as the physical burden-

²²⁷ Immanuel Kant, *Groundwork for the Metaphysics of Morals*, (transl.) Arnulf Zweig, (Oxford: Oxford University Press, 2002), 235.

²²⁸ Gibney, ‘Forced Migration, Engineered regionalism, and Justice between States’, 72.

sharing scheme recognises that there is a 'burden' to be shared by the states, and a moral requirement for each state to bear their proportional share of it. In burden-sharing the question is about obligations, and in contrast to rights more often than not it is the case that they are considered as something that an agent would rather be exempted from.

This response does not, however, yet fully vindicate the tradable quota scheme from the dignity objection. It might still be argued that even if we leave aside the question of negative valuation of refugees, there is something particularly sinister about the tradable quota scheme as it involves 'trading of refugees'. This seems to be one of Gibney's worries in his criticism of the scheme. As the passage quoted above from Kant clearly suggests, setting a price on a person violates the person's dignity. On these grounds, it might be argued that the tradable quota scheme violates refugees' dignity. What should we make of this argument?

Even if there is a price attached to refugees in the scheme, we should be sceptical of the conclusion that this violates refugees' dignity. In the end it is not evident that the 'price' Kant refers to denotes a similar idea of price as that in the tradable quota scheme. One interpretation of Kant's idea of dignity is that it entails a requirement not to trade persons against each other. If this interpretation, which is suggested by Waldron among others, is correct, it is not the case that the scheme violates refugees' dignity. Waldron suggests that the Kantian idea of dignity should be understood primarily as a reference to the 'simple conception of human worth precluding trade-offs'. He refers to an often-cited German Constitutional Court case as an example of the rejection of such trade-offs. In a well-known case, the German court rejected the permissibility of the military to shoot down airliners hijacked by terrorists. In its decision the court appealed to the concept of human dignity, which is outlined in Article 1 of the German Basic Law, and stated that 'human dignity enjoys the same constitutional protection regardless of the duration of the physical existence of the individual human being'.²²⁹

²²⁹ Waldron, 'Dignity, Rank, and Rights', 18. Also Jürgen Habermas gives the German Constitutional Court case as an example of Kantian dignity. He notes that 'an echo of Kant's categorical imperative is unmistakable in these words of the Court. The respect for the dignity of every person forbids the

The court decision may be interpreted as a claim that human dignity prevents the utilitarian calculus which would set a price on those on board a hijacked plane and lead to a possibility of evaluating whether they can be traded against other lives on the ground. The price in the tradable quota scheme differs from this idea of price, as it does not represent a currency with which individuals can be traded against each other. The organisation of states for a remedial response through the trading scheme has no impact on the quality of protection accorded to each refugee, and this applies regardless of the price that will eventually be set on a particular traded quota. Regardless of whether a quota to which a refugee belongs is traded between two countries, the refugee will be entitled to the same minimum level of well-being. This argument supports the conclusion that quota trading does not undermine the value of refugees as Kantian ends. By virtue of their humanity refugees have a claim to be provided with certain protections by the international community and not to be traded against each other. In other words, instead of understanding the scheme as something that aims to treat refugees as simply means, we should rather interpret it as an effort by all member states to restore for each person circumstances where they can be in a position of an end.

Gibney outlines one more argument against the tradable quota scheme on the grounds of dignity, and this argument refers to the idea of dignity as a rank or status of each person regardless of their race, religion, gender, or nationality. Gibney claims that when one state considers some groups of refugees as less desirable than other groups, and as a consequence attempts to purchase the physical accommodation of these refugee groups from other states, the 'traded' refugees are humiliated as a consequence. He gives the examples of U.S. and France, both of which might be willing to pay other states to accept asylum claimants with certain characteristics in the tradable quota scheme. While the U.S. might be willing to accept its allocation of Cuban refugees, it might also attempt to buy its way out of accommodating refugees from Haiti. France may similarly want to pay other countries to take in Muslim

state to dispose of any individual merely as a means to another end'. Jürgen Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights', *Metaphilosophy*, 41 (2010), 465.

refugees, and prefer to accommodate Christian refugees.²³⁰ Gibney argues that ‘there is something uniquely dubious about a market that registers in price terms how much states don’t want particular groups of refugees’, and concludes that negative valuations of particular refugees can go ‘to the core of personal identity’ and may result in ‘long-lasting feelings of resentment and humiliation’.²³¹ The absence of humiliation is an important matter, and if the internal components of the tradable quota scheme may be said to humiliate particular groups of refugees, it can also be said to be morally problematic.²³²

One way to respond to Gibney’s objection is by showing that his concerns can be addressed in the initial quota formation. This reply suggests that the quotas should be formulated in such a way that they are representative of the plurality of refugee backgrounds. The world’s refugees come from many different countries, represent many different religions, and are forced to seek asylum for a variety of reasons. To quell Gibney’s concerns, attempts could be made to compose the quotas in such a way that they consisted proportionally of Cuban, Haitian, Muslim, and Christian refugees. But apart from being a fairly complicated system of quota establishment in practice, there is always a possibility that these types of ‘adjusted quotas’ cannot be established. There may be circumstances in which the quotas will have to be composed disproportionately or completely of refugees with a particular background. Therefore, this reply does not fully address the concerns Gibney raises.

Another possible answer to Gibney’s objection is the introduction of a non-discrimination clause requiring states to refrain from engaging in discriminatory trading practices. In other words, the tradable quota scheme could be established in such a way that the more particular regulations are designed to take into consideration the possibility of discriminatory trading practices. As was pointed out

²³⁰ Gibney, ‘Forced Migration, Engineered regionalism, and Justice between States’, 73.

²³¹ Ibid.

²³² It is worth noting that some theorists question the close link between the concept of humiliation and the concept of dignity. Daniel Statman, for example, argues that ‘tying the concept of humiliation to that of human dignity makes the former too philosophical and too detached from psychological research and theory’. Daniel Statman, ‘Humiliation, Dignity, and Self-Respect’, in David Kretzmer and Eckart Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (London: Kluwer Law International, 2002), 209. This separation of concepts, if considered as valid, does not in any way diminish the importance of absence of humiliation as moral consideration that requires addressing.

earlier, in order for any burden-sharing scheme to function effectively there is a need to establish administrative institutions that advance transparency, accountability, and compliance. The institutions established to administer the trading between states could also be dedicated to oversee compliance with the non-discrimination clause. One practical way to operate a trading regime dedicated to uphold non-discrimination clause would be to establish the quotas as ‘blind’ quotas, and then allow states to trade quotas of refugees the background of whom they do not know.

But in the end, it is questionable whether there is a need to rely on the introduction of the non-discrimination clause at all to address Gibney’s objection. In his account of humiliation – to which Gibney also refers – Avishai Margalit suggests that in the normative sense we should understand humiliation as ‘any sort of behavior or condition that constitutes a sound reason for a person to consider his or her self-respect injured’.²³³ Then the question becomes, what constitutes a sound reason for a person to consider his or her self-respect injured. One reason might be that a person be subjected to treatment in which the inherent rank or status accorded to all persons regardless of their background is not recognised.²³⁴

But does it amount to humiliation of refugees if a state ranks a particular group of refugees as less desirable than some other group and attempts to purchase the accommodation of its quota from some other state?²³⁵ What is it specifically in a preference-ranked trading that amounts to humiliation? Surely it is not the very existence of preference-rankings. If this were the case, it would entail that all social groups that are not considered to be of equal value by other social groups would have a sound reason to be humiliated.²³⁶ What is important to recognise here is that the

²³³ Avishai Margalit, *The Decent Society* (Cambridge: Harvard University Press, 1996), 9.

²³⁴ On seeing and treating other persons as sub-humans, see Margalit, *The Decent Society*, ch. 6.

²³⁵ Overtly racist trading states can admittedly constitute a problem for the tradable quota scheme. But it should be pointed out that this problem is not strictly limited to the tradable quota scheme. In the compensatory scheme states can engage in overtly racist *non-entrée* policies, and in the physical burden-sharing scheme a state can engage in racist practices by making the integration of refugees with a particular background difficult. Put differently, it is hard to see how possible sentiments of overt racism in a country lead to the internal components of the tradable quota scheme being intrinsically problematic.

²³⁶ Here, I am in agreement with Brian Barry, who argues against ‘the politics of recognition’ in *Culture & Equality*. Barry argues that due to incompatibilities in different doctrines ‘it would be

existence of a preference-ranking regarding the desirability of different refugee groups does not have any practical impact on the protection they are entitled to by the virtue of being bearers of the right to asylum. When entering the scheme each complying state recognises the inherent dignity of each refugee as a person regardless of her country of origin, ethnicity, religion, gender, and sexual orientation, and they are committed to providing – in one state or another – asylum to all refugees assigned to their quotas.

Put differently, equal respect is embodied in the commitment of each state to provide protection of the right to asylum to all eligible persons regardless of their background. It is not as if countries are committed to lesser protection of those refugees who they may consider less desirable than other refugee groups whose accommodation they may wish to purchase from other countries. There is no institutionalised bias against refugees with particular backgrounds in the tradable quota scheme. As the scheme guarantees equal protection of the right to asylum to all right-bearers, and as there is a common acceptance within the scheme that the preference-rankings of each particular country regarding the desirability of particular refugee groups ought not to have impact on global refugee protection, it may reasonably be asked whether refugees have a sound reason to be humiliated by preference-ranked trading practices. Regardless of their background, refugees can unapologetically make demands from each state in the scheme, and insist without embarrassment or shame on their equal claim to asylum.²³⁷ They stand in the scheme as persons with a recognised equal rank, and the preference-rankings of particular states regarding the relative appeal of different refugee groups does not undermine this rank of dignity in any way.

absurd to suggest that they had to be publicly affirmed to be equally valuable'. Brian Barry, *Culture & Equality* (Cambridge: Polity Press, 2001), 278.

²³⁷ Joel Feinberg argues that 'having rights enables us to "stand up like men", to look others in the eye, and to feel in some fundamental way the equal of anyone. To think of oneself as the holder of rights is not to be unduly but properly proud, to have that minimal self-respect that is necessary to be worthy of the love and esteem of others.' Conversely, 'to respect a person then, or to think of him as possessed of human dignity, simply *is* to think of him as a potential maker of claims'. See Joel Feinberg, 'The Nature and Value of Rights', *The Journal of Value Enquiry*, 4 (1970), 252. In the tradable quota scheme, refugees can proudly claim recognition from all states as right-bearers. As well, each complying state in the scheme regardless of particular preference-rankings recognises all refugees as 'potential makers of claims' and respects this.

5.2.3 The exploitation objection

The first two objections focused on the position refugees have in the tradable quota scheme. The final moral objection against the scheme examined here focuses on the interrelations between the trading states. This objection claims that although aiming towards burden-sharing between states, the tradable quota scheme leads to the exploitation of the less affluent countries by the more affluent states. In his analysis Gibney suggests that this objection might prove to be insurmountable to the tradable quota scheme, but in the end he stops short of examining it in more detailed way.²³⁸ Here, I will try to fill in the blanks for Gibney, and see whether this type of objection provides sufficiently strong moral reason to abandon the tradable quota scheme.

The objection might be formulated in the following way: due to their affluence and superior purchasing power the affluent states are in a strong position to buy their way out of obligations to physically accommodate refugees within a tradable quota scheme. As the actual costs of providing asylum in the developing countries are a fraction of what they are in the more developed countries, this means that it would be less costly for the affluent states to pay for the same absolute level of well-being for their quota of refugees in the developing countries than it would be for them to physically accommodate their quotas. Conversely, due to their weak bargaining positions and low general levels of well-being developing countries are in a desperate situation to accept any even seemingly beneficial trading of quotas. Therefore, the argument goes, the affluent states are able to effectively opt out of the provision of asylum by exploiting developing countries as ‘refugee accommodating factories’.

This objection does not suggest that the trading of quotas *per se* is problematic, but rather that the trading between countries is problematic when it involves the moral wrong of exploitation. In order for us to be in a position to conclude whether or not this objection is actually valid, and whether or not the tradable quota scheme in fact leads to exploitation of some countries, there is a need to consider the concept of exploitation more closely. Without a clearer idea of exploitation it is not possible to

²³⁸ Gibney, ‘Forced Migration, Engineered regionalism, and Justice between States’, 74.

conclude the argument either way. So what exactly does it mean to say that someone is exploited by someone else? As was the case with the concept of dignity examined in the previous section, the concept of exploitation is likewise a controversial and elusive one. One general way to understand exploitation is to hold that exploitation happens when ‘an agent A is taking advantage of agent B unfairly’. But from this general definition it is hard to conclude with greater clarity what it means for an agent to be exploited. After all, there is an appeal to another famously elusive concept in this general definition: fairness. Richard Arneson’s depiction captures well the burdensome nature of the analysis of the concept of exploitation: there will ‘be as many competing conceptions of exploitation as theories of what persons owe to each other by way of fair treatment’.²³⁹

As the question here is primarily about whether the developed countries take unfair advantage of the developing countries when engaging in quota trading with them, the enquiry into exploitation can be limited to the question of transactions that occur between the parties when the trading of quotas takes place. Under what circumstances can the quota transactions be said to be exploitative? The first element of any exploitative transaction is the occurring of benefits. If a transaction between two agents harms one agent, and does not benefit the other agent at all, we might call the transaction ‘oppressive’ or ‘coercive’, but it does not seem to constitute the same kind of moral wrong as exploitation. So the question about unfair transactions is related to the possible benefits received by the developed countries in the trading of quotas. As it can be the case that some states are able to purchase the quota accommodation from other countries for an amount less than the comparable costs of physical accommodation, it may be argued that at the very least the first condition of exploitation is met in the tradable quota scheme: the developed countries would seem to be gaining some benefit.

But to benefit from a transaction is not the same as engaging in an exploitative transaction. In an exploitative transaction the exploiter benefits unfairly from the

²³⁹ Richard Arneson, ‘Exploitation’, in Lawrence C. Becker and Charlotte B. Becker (eds.), *Encyclopedia of Ethics* (London: Routledge, 2001), 350.

transaction. Then the question becomes, how can we conclude whether quota transactions unfairly benefit a developed country? There seem to be two more general ways to approach the issue. The first way is to focus on the fairness of the transaction process. If it is concluded that the transaction process between countries is somehow unfair, then it can also be concluded that the outcome of the quota transaction process is exploitative. One central way in which the process may be said to be unfair is if it involves coercion.²⁴⁰ If a developed country makes a coercive offer to a developing country with respect to a refugee quota and benefits from the following transaction, this process amounts to ‘taking advantage of a weaker country unfairly’.

But once we look at what is at stake for states if they fail to come into agreement regarding quota trading, it is not directly clear that in the scheme the less affluent countries are in a position to be subjected to coercive trading offers. One generally recognised feature of a coercive offer is the level of desperation of the party to which the offer is made.²⁴¹ But the quota system evades the issue of severely desperate trading partners, as states are obligated to participate in the scheme only if they have not sufficiently discharged their citizens’ duties of assistance. Even if we accept that the duties of assistance corresponding the right to asylum are extremely stringent²⁴², it is still the case that there would be no obligation for those states to participate in the scheme that are not able to sufficiently protect their citizens’ basic needs. As I argued in chapter two, there is no obligation of justice to satisfy a person’s basic need if the efforts require harming the basic needs of other agents. The separateness

²⁴⁰ What exactly it means to be ‘coerced’ is a broadly debated philosophical issue. On the coercion debate more closely see for example Robert Nozick, ‘Coercion’, in Sidney Morgenbesser, Patrick Suppes and Morton White (eds.), *Philosophy, Science, and Method*, (New York: St. Martin’s Press, 1969); Virginia Held, ‘Coercion and Coercive Offers’, in Roland J. Pennock and John W. Chapman (eds.), *Nomos XIV: Coercion* (Chicago: Aldine-Atherton, 1972); Harry Frankfurt, ‘Coercion and Moral Responsibility’, in Ted Honderich (ed.), *Essays on the Freedom of Action* (London: Routledge & Kegan Paul Ltd, 1973); Alan Wertheimer, *Coercion* (Guildford: Princeton University Press, 1987). Here, I will stop short of providing a comprehensive account of coercion. This is centrally because, as I will shortly suggest, the international institutions overseeing the trade may be established in such a way that they invalidate the trade whenever there may be said to be ‘coercion’ involved.

²⁴¹ For example, in a life-threatening situation a potential rescuer may demand 99 per cent of the rescued person’s assets as compensation for nearly costless rescue. While the rescued person may be said to benefit from the transaction, it seems reasonable to suggest nevertheless that the rescuer wrongly exploited the unfortunate situation of a person and in fact made a ‘coercive offer’.

²⁴² In chapter six I will look more closely the question whether the duties corresponding to the right to asylum are extremely stringent.

of persons has to be taken into account when establishing the final scope of basic needs that matter from the perspective of justice. In other words, in the possible trade agreements it is not the basic needs of the citizens of any trading country that would be at stake. The states engaging in trading would be countries aiming to gain some benefits for their citizens beyond their basic needs, and to take advantage of other states' desire to compensate for the accommodation of their quotas.

It seems that it is in fact the developing countries rather than the developed countries that would be in a strong bargaining position in the quota trading market. The starting-position in the tradable quota scheme is physical burden-sharing, i.e., the failure to come into trade agreements entails that all states would be required to accommodate the physical quotas that were assigned to them in the initial allocation. The developing countries would be well aware that the failed negotiations entail that the developed countries would have to bear the burdens of physical accommodation – a scenario which many developed countries may desperately wish to avoid. The existing developed countries would presumably wish to trade quotas allocated to them which comprise persons with distinctively different cultural backgrounds and persons belonging to certain religions. Also, the developed countries would acknowledge that any successful trading at a cost lower than the cost of physical accommodation would benefit them. The developing countries, whose basic needs are not at stake, would be well aware of these factors, and they could use them as leverage in the negotiations. They could effectively sit back in the market negotiations and let the affluent countries compete with each other and offer trade proposals. If a developing country deemed that all of the proposed trade agreements offered insufficient benefits, by doing nothing it would only forgo the proposed benefits. On these grounds it may be reasonably asked which countries exactly would have the upper hand in the quota trading negotiations.

At this point it might be replied that these observations do not form a sufficient guarantee against exploitation in the form of coercive trade agreements. In other words, it might be argued that this is all presumptive talk relying on empirical contingencies, and that there is still a possibility of cases where exploitation between

trading countries occur. But there is no need to rely strictly on the validity of previous arguments in order to vindicate the tradable quota scheme from the exploitation objection. There is a further consideration due to which we should be sceptical of the claim that the exploitation objection focusing on coercive offers succeeds to undermine the tradable quota scheme. This is centrally because the issue of coercive trading process may be addressed with the mediating institutions that would be part of the trading market. As was pointed out in the first section of the chapter, the implementation of any comprehensive burden-sharing scheme should be coupled with the establishment of an international authority overseeing accountability, compliance, and transparency. In the context of a tradable quota scheme this overseeing authority can be dedicated to consider also whether the quota trading is linked to coercive offers between countries. In cases where the offer is deemed coercive, the mediating institution could be authorised to invalidate the occurring trades. The authority of the administrative institution may be extended in such a way that it also considers trade agreements *ex post*, and takes into consideration the broader context of where the agreement has taken place. In other words, the overseeing authority could be set up to manage the trading in such a way that the issue of unfair trading processes may be precluded or remedied.

Apart from the focus on the unfairness of the trading process, the exploitation objection might also be fleshed out by focusing on the unfairness of outcomes in the trade agreements. A critic taking this position might draw an analogy between sweatshops and the tradable quota scheme, and argue that the developed countries could exploit the developing countries by using their bargaining position to gain more than their fair share of benefits from the trading of quotas.²⁴³ On this account the occurring unfairness would consist of insufficient compensation being paid to the developing countries in the scheme.²⁴⁴ What is the force of this formulation of the exploitation objection?

²⁴³ On sweatshops and exploitation, see for example Chris Meyers, 'Wrongful Beneficence: Exploitation and Third World Sweatshops', *Journal of Social Philosophy*, 35 (2004); Robert Mayer, 'Sweatshops, Exploitation, and Moral Responsibility', *Journal of Social Philosophy*, 38 (2007a).

²⁴⁴ Robert Mayer claims that in every form of exploitation the question is essentially about 'a failure to benefit others as some norm of fairness requires'. He distinguishes between three classes of failure to benefit other agents: (1) not benefiting the victims at all, (2) not benefiting them sufficiently, and

The objection suggests that in order for the quota transaction to be non-exploitative, there is a requirement that all countries receive sufficient compensation for accommodation of other countries' physical quotas. It is not, of course, an uncomplicated question what level of compensation allows us to conclude that no exploitation occurs in the outcome of quota trading. There are many ways to understand the concept of sufficient compensation, and in the end it is a highly politicised one.²⁴⁵ There are also many ways to approach the issue of sufficient compensation.²⁴⁶ But in the end, the question of the appropriate framework for establishing an account of sufficient compensation does not have to be solved in order for us to be able to address the second formulation of the exploitation objection.

The second formulation of the exploitation objection can be addressed in a similar fashion as the first formulation. The question of compensation does not have to be strictly a matter between two states, but rather it can be a matter of a larger global market system that includes regulatory mechanisms. Thus, whichever more specific account of sufficient compensation is accepted, the mechanisms of the tradable quota scheme may be arranged in such a way that it integrates the requirements of fair compensation in it. This requirement could be then overseen by the mediating trading authority, which can declare null all trade agreements that do not satisfy the requirement of fair compensation.

(3) not benefiting them authentically. The first class refers to free-riding, the second class for example to sweatshops, and the third class to *prima facie* benefits that are in fact harms, e.g., selling drugs to a junkie. See Robert Mayer, 'What's Wrong with Exploitation', *Journal of Applied Philosophy*, 27 (2007b), 142.

²⁴⁵ Among possible theories on the grounds of which an account of sufficient compensation might be established are; a neoclassical view, which determines sufficient compensation in relation to market equilibrium; 'a fair trade view', which focuses on a particular outcome in relation to the trading agent's well-being; a Marxist view, which requires that the compensation should be set to such a level that it leaves no benefit for the capitalist.

²⁴⁶ One possible way to examine the level of fair compensation is with the veil of ignorance. We can imagine a deliberation behind the veil of ignorance on the general rules of compensation. Then, on this approach, a fair compensation would be one which all reasonable parties, without knowing whether their home country is a developing country or a developed country, would agree upon. See John Rawls, *Theory of Justice* (Harvard: Harvard University Press, 1999a), 118-123.

Even Marxist concerns about sufficient compensation – if considered valid – could be accommodated into the tradable quota scheme. On Marxist grounds it might be argued that any trading below the costs of accommodation to the developed country would be exploitative to the developing country because it can be equated with ‘working for a capitalist’.²⁴⁷ Even if we accepted that this claim represents an appropriate analogy, which in itself is questionable, there is no principled reason why we could not conclude that the trade may be limited to a price that would reflect the burdens of accommodation for the country to which the quota has been initially allocated. The central point for our current purposes is that the concerns of insufficient compensation are not something that could not be addressed in the framework of tradable quota scheme. There are no intrinsic components in the scheme that would be at odds with any potential set of market regulations that aimed to guarantee that parties are sufficiently compensated in the trading.

It is of course the case that when established as a *laissez-faire* system the tradable quota scheme can lead to exploitation in either of the forms examined here. Free market trading system does not adequately take into consideration the possibility that a quota trading between countries may be the result of coercive offers or that it does not involve sufficient compensation. In such a form, the scheme would be morally objectionable. But this does not entail that the scheme could not possibly be established in a form in which the issue of exploitation is avoided. Once appropriate institutional safeguards are introduced, the trade between states can be done in a market place that protects against coercive offers and guarantees that each quota transaction follows the requirements of sufficient compensation. In sum, the exploitation objection does not constitute an insurmountable moral obstacle for the tradable quota scheme.

²⁴⁷ For a Marxist view of exploitation, see for example G. A. Cohen, ‘The Labor Theory of Value and the Concept of Exploitation’, *Philosophy and Public Affairs*, 8 (1979), 356. Cohen argues that the Marxist idea of exploitation should be understood in the following way: The labourer is the only person who creates the product which has value. If the capitalist receives some of the value of the product, the labourer receives less value than the value of what he creates. Therefore, the labourer is exploited by the capitalist.

5.3 The comparative moral appeal of the tradable quota scheme

So far I have examined three moral objections against the internal components of the tradable quota scheme. I have argued that either the objections fail due to one reason or another or the more specific implemented scheme may be structured in such a way that it accommodates the concerns that were raised in the objections. As I suggested in the earlier sections, apart from examining the scheme in relation to its components, there is also another way to evaluate the moral appeal of the tradable quota scheme: comparative evaluation. In other words, even if we accept that the scheme is not internally problematic with regard to its components, this brings us only half way in showing that the tradable quota scheme constitutes a morally desirable institutional proposal for burden-sharing in the context of refugee protection.

The central alternatives to which the tradable quota scheme should be compared are the two stand-alone schemes it derives from, the compensatory scheme and the physical burden-sharing scheme. How does the tradable quota scheme morally compare to these schemes? First, consider the compensatory scheme. While it may be the case that the compensatory scheme could be implemented without introducing radical changes to the current refugee regime, from a moral perspective there are strong reasons to resist the implementation of the compensatory scheme as the primary burden-sharing scheme. There are three central reasons that support this conclusion. Firstly, the compensatory scheme distributes physical burdens with the *non-refoulement* principle. As was pointed out in the previous chapter, to accept the *non-refoulement* principle as the mechanism of distributing refugees is to fully overlook the fact that some states are ‘unlucky’ in the sense that they either share borders with countries facing refugee crises. These states can reasonably ask of other states in a similar position to accommodate refugees: ‘why should we bear all the physical burdens of refugee protection?’

Secondly, in more practical terms the scheme seems least capable of addressing the currently existing problem of incentives for states to engage in *non-entrée* policies. To put it differently, of the three proposals it is only in the compensatory scheme that

the success of a state in practicing *non-entrée* policies has a direct effect on the responsibility to physically accommodate refugees. In the scheme there are no recognised binding obligations to share the physical burdens of refugee protection between states. States also know that by implementing strategic policies they may unilaterally influence the amount of physical burden they will eventually have to bear. Considering these factors, states can engage in self-interested calculation and end up applying the same evasive tactics as in the current refugee protection regime in order to not to have refugees filing asylum claims on their territories. Apart from leading to disproportionate distributions of physical burdens between states, this can undermine the effectiveness of refugee protection and lead to refugees' prolonged search for a benevolent country that will not turn them away at the border. In other words, the irony is that while the *non-refoulement* principle may lead to more extensive accommodation of refugees according to their preferences than the distributive mechanisms in the two alternative schemes, it simultaneously provides states with an incentive to attempt to divert the flows of refugees to other countries that remains absent in the alternative schemes.

Finally, one practical advantage both the tradable quota scheme and the physical burden-sharing scheme have over the compensatory scheme is that they can deter false asylum applications to a greater degree. Those who are not in actual need of protection may attempt to exploit the asylum system to gain entry to a particular country. But if the applicants are not certain that they will eventually be accommodated in the country where they have applied for asylum, those without genuine need might be more hesitant to claim asylum in other countries.²⁴⁸

In a nutshell, both the physical burden-sharing scheme and the tradable quota scheme recognise the nature of the claim to asylum better than the compensatory scheme, and they seem to be more capable of addressing the problem of the incentives for *non-entrée* policies and false asylum applications. Due to the implementation of

²⁴⁸ See also Joseph Carens, 'The Philosopher and the Policymaker: Two Perspectives on the Ethics of Immigration with Special Attention to the Problem of Restricting Asylum', in Martin Hailbrunner, David A. Martin and Hiroshi Motomura (eds.), *Immigration Admissions* (New York: Berghahn Books, 1997), 37.

collective status determination processes, states can let in refugees knowing that other states have an obligation to bear only part of the physical burdens. These grounds provide strong reasons to conclude that of the three schemes examined here the compensatory scheme constitutes the least morally appealing comprehensive institutional scheme.

What about the comparative appeal of the tradable quota scheme in relation to the physical burden-sharing scheme? I believe that in the end, the tradable quota scheme constitutes at the very least an as appealing if not more appealing institutional scheme as the physical scheme. The appealing aspect of the tradable quota schemes is that it leaves open to states a broader range of possible ways to discharge their obligations in global refugee protection than the rigid physical burden-sharing scheme. Then, the question is essentially whether or not the establishment of the market for trading the initially allocated physical quotas constitutes ‘one step too far’ in the institutionalisation of the right to asylum, or whether it amounts to a valuable extension of the physical burden-sharing scheme. Are there strong enough reasons not to take the step from the physical burden-sharing scheme to the tradable quota scheme? The objections considered in the previous sections are among the possible reasons for not extending the physical burden-sharing scheme to the tradable quota scheme. The right to trade should be rejected if the trade would violate some other requirements of justice, such as the obligation to treat refugees in a dignified way or the obligation not to exploit others. But as I have suggested in the analysis above, these concerns can be laid to rest. These conclusions give us strong evidence that the additional step from the physical burden-sharing scheme is not morally problematic.

Conclusion

In the current chapter, I have examined the moral dimensions of the tradable quota scheme. The scheme can be understood as one institutional proposal for replacing the existing global refugee regime and for perfecting imperfect duties corresponding the moral right to asylum on the interstate level. I suggested that the tradable quota scheme is a synthesis of two separate stand-alone institutional schemes, the compensatory scheme and the physical burden-sharing scheme. I also examined three

moral objections against the tradable quota scheme, and claimed that the concerns raised in these objections can be either rejected or they can be accommodated in the institutional arrangements of the scheme. Finally, while I stopped short of conclusively showing that from the comparative moral perspective the tradable quota scheme constitutes the best possible scheme for institutionalising the right to asylum, there is nevertheless an indication that it is at the very least as morally appealing if not morally superior to the schemes it derives from.

6. Protection of the right to asylum and partial compliance

In 2001, after Australia had turned away a group of asylum seekers arriving on a Norwegian cargo ship ‘Tampa’, General Pervez Musharraf, who at the time served as the President of Pakistan, questioned the duty of Pakistan to grant asylum to any additional applicants. He pointed out that if a wealthy country like Australia refused to open its borders to a handful of boat people, why should a poor and unstable country like Pakistan (which was already accommodating a relatively disproportionate number of Convention refugees when compared to national wealth) continue granting asylum to arriving applicants.²⁴⁹ Musharraf was correct in pointing out that there is an enormous difference in the Convention refugee intake between Pakistan and Australia. In 2009 Pakistan was hosting the most Convention refugees in the world (1.7 million). It also hosted the largest number of Convention refugees in relation to its economic capacity, with 733 refugees per 1 USD GDP (PPP) per capita.²⁵⁰ In contrast, Australia ranked 77th on the list, hosting only 0.6 Convention refugees per 1 USD GDP per capita. Musharraf’s argument is also related to important moral questions regarding partial compliance in the protection of the right to asylum. If some duty-bearers with the capacity to assist bearers of the right to asylum unjustly default, are the complying duty-bearers obligated to ‘take up the slack’ and bear the non-compliers’ burdens?

The current chapter focuses on what may be called the ‘partial compliance theory’ in the context of refugee protection.²⁵¹ In the first section of the chapter, I will outline an argument suggesting that citizens of complying states are not obligated to bear non-complying states’ burdens in the global protection of the right to asylum. In the second section, I will examine whether this argument provides a satisfactory account

²⁴⁹ Satvinder Singh Juss, *International Migration and Global Justice* (Aldershot: Ashgate, 2006), 233.

²⁵⁰ It was followed by the Democratic Republic of the Congo (496 refugees per 1 USD GDP (PPP) per capita) and the United Republic of Tanzania (262). The first developed country on the list is Germany in the 26th place with 16 refugees per 1\$ GDP (PPP) per capita. UNHCR, Global Trends 2008, 3. Available online: <http://www.unhcr.org/4a375c426.html> (accessed 19.07.11).

²⁵¹ In *A Theory of Justice*, Rawls suggests that partial compliance theory is dedicated to study those ‘principles that govern how we are to deal with injustice’. John Rawls, *A Theory of Justice* (Harvard: Harvard University Press, 1999a), 8.

of obligations of the citizens of complying states in circumstances of partial compliance. I will suggest several reasons in support of a conclusion according to which the citizens of complying states can have an obligation to assist the bearers of the right to asylum who should have been assisted by citizens in the non-complying states. In the final section of the chapter, I will turn to consider the stringency of obligations in global refugee protection more closely. In the section I will argue that the complying states should be understood to have at the very least moderately stringent obligations towards right-bearing refugees regardless of the compliance and non-compliance of other states.

6.1 Full and partial compliance in global refugee protection

Let us start with preliminaries. As the right to asylum is against the international community at large, citizens of all states with the capacity to assist may be said to collectively share the responsibility in protecting the right to asylum.²⁵² If we are asked how exactly the burdens of refugee protection should be distributed among the duty-bearers with the capacity to assist, the obvious answer is that each duty-bearer should have to bear only their ‘fair share’ of the overall burdens in global protection of the right to asylum. For the time being, let us leave aside the more practical question of what exactly constitutes a fair share of burden for each duty-bearer, and simply assume that an ideal account of fair distribution of burdens between duty-bearers can be outlined.²⁵³

To keep the analysis simple, let us also leave aside the more specific issues of distributing burdens within states, and focus on partial compliance on ‘statist level’.²⁵⁴ As was pointed out in chapter three, states may be understood to function as ‘clearinghouses’ that can – and should – perfect and enforce the imperfect duties of

²⁵² See also David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), 225-226.

²⁵³ Note, however, that the identification of fair shares of burdens does not necessarily require political agreements and the existence of a *de facto* burden-sharing scheme. In the determination of fair shares of burden, such devices as the ‘veil of ignorance’ may be useful. Here, I will stop short of examining the best possible way to establish the fair shares of burden for each duty-bearer with the capacity to assist bearers of the right to asylum.

²⁵⁴ For a legal enquiry into states’ collective responsibility in the protection of refugees see Agn s Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford: Oxford University Press, 2009), ch. 4. And 5.

their duty-bearing citizens in the protection of universal entitlements. On the simplified statist approach accepted in the current chapter, states may be divided into complying and non-complying states.²⁵⁵ The complying states are those states satisfactorily mediating and enforcing their citizens' duties of assistance, therefore obediently bearing their fair share, however arrived at, of the overall burden of global refugee protection. In turn, the non-complying states are those states that choose not to bear the burdens of refugee protection at all or choose to bear only some burden but not their full share.

In circumstances of full compliance the right-bearers' access to asylum depends on the magnitude of the occurring humanitarian crises, i.e., the need for asylum, the stringency of obligations of citizens of states with capacities to assist, and the actual overall capacities to assist. What about in circumstances of partial compliance?²⁵⁶ What happens when some states unjustly default, and unilaterally decide against bearing their fair share of burdens? Do the burdens of assistance transfer to citizens of other states? This constitutes an important moral issue, as the complying states need guidelines for non-ideal circumstances under which other states disregard their obligations.

Some theorists have suggested that obligations on complying duty-bearers in a group of duty-bearers do not change in non-ideal circumstances where other duty-bearers choose not to comply with morality's demands. Jonathan Cohen and Liam Murphy, for example, have defended this type of view. Cohen asks us to imagine a distant island with two small communities, one poor and the other affluent due to existing climate differences. While according to Cohen members of the affluent community each may have a duty to give food to the members of the poor community so that they can avoid starvation and malnutrition, the complying members of the rich community are not obligated to step in on behalf of their non-complying fellows and

²⁵⁵ The idea of full compliance can be understood as doubly ideal, as it assumes that *all* duty-bearers *fully* comply with the requirements of justice. In the realm of non-ideal, both of the ideals of full compliance can fail. See Liam Murphy, *Moral Demands in Nonideal Theory* (Oxford: Oxford University Press, 2000), 57.

²⁵⁶ On the relevance of moral analysis within the domain of partial compliance, see for example Zofia Stemplowska, 'What's Ideal About Ideal theory?', *Social Theory and Practice*, 34 (2008), 331-332.

discharge more than what would be their share of duties towards the less affluent community under the circumstances of full compliance.²⁵⁷ In his book *Moral Demands in Nonideal Theory* Liam Murphy outlines a very similar but more elaborate account of obligations in circumstances of partial compliance. He proposes ‘the compliance condition’ as the central limiting factor for duties of assistance, and argues that ‘an agent-neutral moral principle should not increase its demands on agents as expected compliance with the principle by other agents decreases’.²⁵⁸

Following Cohen’s and Murphy’s arguments, it might be claimed that in circumstances of partial compliance there is no obligation on complying states to bear those burdens in global refugee protection that belong to the non-complying states. On this approach, no state is required to take up the slack if other states wrongfully default. It is not hard to see why some may consider this argument appealing. After all, it is morally desirable in itself that all states have to bear strictly the burdens distributed for them under the presumption of full compliance. The approach recognising the level of overall compliance is designed to advance an important moral aim, and it does not ‘punish’ states for the non-compliance of other states. The non-compliance with the requirements of refugee protection clearly constitutes an injustice by the non-complying states. In such cases, non-complying states fail to sufficiently acknowledge that refugees have a binding claim of protection against them, and that they have a share of burdens they are under obligation of justice to bear.

When complying states are obligated to bear the burdens that belong to non-complying states, the direct benefit to non-compliers is that they are free to allocate the relevant resources elsewhere. As well, there can be indirect benefits for non-complying states. If complying states are already disadvantaged compared to non-complying states, the additional burden may affect their global competitive position detrimentally. Many countries struggle to succeed in the global trade market, and disproportionate burdens resulting from the moral requirements of refugee

²⁵⁷ Jonathan L. Cohen, ‘Who is Starving Whom?’, *Theoria*, 47 (1981), 73.

²⁵⁸ Murphy, *Moral Demands in Nonideal Theory*, 77.

accommodation can lead to even greater competitive disadvantage on this area. When other states choose not to comply with the requirements of refugee protection, the citizens of the complying states may ask: ‘why should we bear the burdens that belong to some other states? It is not us who have committed the unjust omission. Why should we be held accountable for the unjust omissions of other states?’

What should we make of the argument of the citizens of the complying states? Should we accept that the accounts offered by Cohen and Murphy provide a satisfactory guideline for understanding obligations of states in global protection of the right to asylum in circumstances of partial compliance? Should we accept that when some states choose malevolently against discharging their citizens’ fair share of responsibilities, other states do not have to step in on their behalf and make up for the non-compliance? In the next section, I will turn to examine this question more closely.

6.2 Are complying states obligated to bear burdens of non-complying states in refugee protection?

In the current section, I will consider three responses to the argument outlined in the previous section. The responses suggest that the claim that states are obligated to bear only the burdens allocated to them under the presumption of full compliance offers an unsatisfactory account of obligations in the global protection of the right to asylum.

Let us start with the strict interpretation of the argument. If followed to the letter, the argument outlined in the previous section entails a conclusion according to which the obligation will not transfer regardless how minor the additional burdens for the complying states would be in the absolute sense, how extensive absolute capacities there would be to bear the additional burden, and what would be at stake in the transferring of the burdens. In the end, I believe this is a questionable conclusion to arrive at.²⁵⁹ Is it really unreasonable to claim that justice can demand that an

²⁵⁹ Some critics have referred to the ‘drowning child scenario’ to exemplify this issue in the theories of moral obligation outlined by Murphy and Cohen. If there are two drowning children, and two passers-by in a suitable position to rescue the children, each passer-by may be considered to have an

extremely wealthy state already bearing its fair share of the collective burden is required to assist a handful of right-bearers if it could save their lives by bearing practically non-existent additional burdens? For example, if a boatload of refugees that had been unjustly rejected by some other state could be saved from imminent death by a complying rich state, it seems questionable whether the state could claim that it had no further obligations of assistance. After all, the additional contributions required would be practically non-existent for the citizens of the assisting state, and it would result in the prevention of imminent deaths. Once the burdens of assisting a small group of – say a group of 30 – right-bearers is distributed within a wealthy state between millions of citizens, there is no practical impact on any of the particular duty-bearers. It seems that at least in these types of cases it would be unreasonable for a state to deny assistance from the needy right-bearers.

This response suggests that those states with extensive capacities to assist right-bearers should bear more than their fair share of the collective burden at the very least in circumstances of partial compliance where the benefits of assistance are substantial and the additional burdens non-existent. The response, if valid, undermines the strict interpretation of the argument. But here I do not wish to rely solely on it. This is the case centrally because by itself it constitutes a fairly weak counter-claim against the position that states are obligated to bear the non-complying states' burdens. It suggests only that there can be exceptional circumstances where it would be unreasonable for the states to refrain from assisting the needy right-bearers who have been left unjustly without assistance by other states. An advocate of the argument outlined in the previous section might simply reply that a clause can be introduced for exceptional circumstances where the benefits of assistance are

obligation to rescue one of the children if they are able to do so within the limits of reasonable costs. However, if one of the passers-by decides to run away, according to the view outlined in the previous section the other passer-by still has an obligation to rescue only one child even if the second rescue would impose only very limited additional burden, and even if the complying rescuer would have substantial absolute capacities at his disposal. Bart Streumer, 'Review of Liam B. Murphy, *Moral Demands in Nonideal Theory*', *Ratio*, 17 (2004), 361. It is noteworthy to point out that there are also some philosophers, such as Jeffrie G. Murphy, who consider that there is no moral duty to rescue a drowning child even if a person is sitting by the pool and could do so simply by putting down one's drink and reaching towards the child who is only few inches away. Jeffrie G. Murphy, 'Blackmail: A preliminary Inquiry', *The Monist*, 63 (1980), 168 n. 6. For a criticism of Murphy's extreme position, see Joel Feinberg, 'The Moral and Legal Responsibility of the Bad Samaritan', *Criminal Justice Ethics*, 3 (1984), 57-58.

substantial and the additional costs to the burden-bearing state non-existent. Thus, even if the response outlined here is successful, most of the claim that states are obligated to bear only their fair share of the collective burdens still remains intact.

Let us consider an alternative response that takes us beyond exceptional circumstances. The second line of response suggests that if states have, due to lack of political will, failed to establish a global system of accountability that would effectively advance compliance among the collective of states comprising duty-bearers with the capacity to assist the right-bearers, the complying states can be said to have an obligations to bear the non-complying states' burdens.²⁶⁰ This response focuses on the link between efforts to establish mechanisms that effectively promote compliance and the shifting of obligations in circumstances of partial compliance. While I believe that this line of response suggests a valid reason why the burdens can be shifted from non-complying states to complying states, it also has certain obvious limitations. If citizens of complying states have taken reasonable steps to advocate a system that advances compliance effectively, they cannot be held morally responsible for the failure of the establishment of institutions promoting compliance. In turn, if the complying states cannot be held morally responsible for the failure to establish a scheme that effectively advances compliance within the collective, then the response fails to provide reasons why the obligation can be shifted from the non-compliers to the compliers. Thus, this response works only when the complying states are morally responsible for the failure to establish institutions that effectively advance compliance in global efforts of protecting the right to asylum.

There is also a third line of response available. This response constitutes, I believe, the strongest objection considered in the current chapter. A central problem with

²⁶⁰ On the duty of a random group to organise itself as a decision-making group and reach decisions regarding assistance, see Virginia Held, 'Can a Random Collection of Individuals be Morally Responsible?', *Journal of Philosophy*, 67 (1970), 471-481. Held gives an example of three pedestrians witnessing an accident, and argues that the fact that they happen to be in a position to help imposes on them a collective responsibility to get organised and provide aid to the victim of the accident. Held contends that a random group may be 'morally responsible for not constituting itself into a group capable of deciding upon action [...] when it is obvious to the reasonable person that action rather than inaction by the collection is called for' in the situation. On the issue of collective inaction and responsibility in more general terms see Larry May, *Sharing Responsibility* (Chicago: Chicago University Press, 1992), ch. 6.

Murphy's and Cohen's views on the distribution of burdens within a group under circumstances of partial compliance is that the idea of 'group' is understood in a reductive way, i.e., the group obligation is considered as a sum of its individual members' obligations. But when we are talking about group obligations, why could the obligation not amount to more than the total of all individual members' obligations. Put differently, the fact that it would be morally appealing that within the group burdens are distributed fairly does not directly validate the claim that we should understand the group obligations strictly as the total of all of its members' separate obligations. When considering group obligations there is not only a need to consider the distributions of burdens within the group, but also the collective duty of the collective to those on the outside. These two dimensions are separable from each other. Different allocations of responsibility within the collective can have an impact on the output of the collective, i.e., one form of distributing burdens within the group can more broadly provide the bearers of the right to asylum sufficiently secure access to the content of their right than some other form.

There is a group of persons with a claim of justice to asylum, and this claim is directed collectively against all states with the capacity to assist. Those right-bearers left without asylum take no comfort in the knowledge that they would have had access to asylum if (and only if) all states had fully enforced compliance of their citizens, who as a consequence of enforcement would have satisfactorily borne their fair share of the collective burden. The right-bearers might say to the complying states with capacities to assist them: 'what we care about is having access to asylum. We have a general claim to asylum against all states as a collective, and some of you have capacities to protect our rights. So you should protect our rights, and solve internal disputes of compliance and burden distribution amongst yourselves without letting us suffer further'.

What I believe strengthens the conclusion that we should not understand obligations in a fully reductive way in the current context is that it is the basic needs of persons that are at stake in access to asylum. These needs constitute fundamentally important considerations of justice that are not easily overridden by other considerations. When

a state denies assistance from bearers of the right to asylum, it owes a satisfactory explanation for its omissions due to the existing right-bearer/duty-bearer relationship. It is not directly clear that it is sufficient for a state to refer to the fact that other states have failed to comply with the requirements of justice. After all, it is one thing to refer to the lack of absolute capacities as a reason for refusing to contribute to the protection of the right to asylum, and completely another thing to refer to the fact that other duty-bearers in other states have defaulted and that as a consequence citizens of the complying state have to bear 'unfair' burden.

The argument on the requirement to bear only the shares of burden allocated under the presumption of full compliance essentially suggests that an unfair distribution of burdens constitutes a greater injustice than the injustice of some right-bearing refugees remaining without asylum. In the end, I believe this is a dubious claim to make. To assert that fairness in burden distribution overrides the fundamentally important right to asylum would be, in the words of Peter Singer, 'taking fairness too far'.²⁶¹ Why should the injustices in burden distribution be passed on to the bearers of the right to asylum? The injustice that occurs in burden distribution is surely an important issue, but taking into consideration what is at stake in the right-bearers' access to asylum it seems reasonable to suggest that it constitutes the 'lesser injustice' in the current case.

So far, I have examined three responses to the claim that states are obligated by justice to bear only their fair share of burdens in global refugee protection. I suggested that while each of the responses has some merit, the third response proves to be the strongest. The right to asylum constitutes a fundamentally weighty claim of justice, and we should be sceptical of the conclusion that it is enough for states to appeal to unfair burden distribution when declining assistance to refugees. Consider, then, a counter-argument against the position that citizens of a complying state are obligated to bear more than their fair share of burdens in protecting the right to

²⁶¹ Peter Singer, 'The Singer Solution to World Poverty', *New York Times Sunday Magazine*, September 05 (1999), available online: <http://www.nytimes.com/library/magazine/home/19990905mag-poverty-singer.html> (accessed 19.07.11).

asylum. In his analysis Cohen suggests that if there exists a requirement to bear others' share of burdens in circumstances of partial compliance, each duty-bearer, 'even if otherwise he was inclined to contribute, could legitimately infer that, if he failed to do so, those with tenderer consciences than himself would make good the deficiency'.²⁶² Put differently, Cohen is arguing that if we accept that obligations can transfer from the non-compliers to the compliers, there is a fear that this can reinforce the temptation to default for those who may already be considering inaction.²⁶³ Should we give up the position requiring states to bear other states' burdens in non-ideal circumstances on the grounds that it offers incentives for non-compliance? Consider four reasons why Cohen's objection fails to be convincing.

Firstly, it is a stretch to say, as Cohen does, that the non-complying duty-bearers can 'legitimately' infer their conclusion. At most, the shifting of obligations constitutes one consideration in states' self-interested reasoning. Secondly, even if we accepted that on the one hand there may be an incentive for some states to fail to comply if the obligations are transferable, on the other hand the requirement to bear other states' burden in circumstances of partial compliance may offer incentives for the complying states to push for institutional reforms that advance compliance and burden-sharing.²⁶⁴ Thirdly, Cohen's argument relies on an empirically contingent claim. An account of justice that requires states to bear the burdens of non-complying states may not *necessarily* lead to lesser compliance and lesser protection of right-bearers than the account defended by Cohen.

Finally, Cohen's argument about incentives is not primarily targeting a theory of burden distribution, but rather the mechanisms of enforcing compliance. Whether states refrain from complying in the global domain depends on the overall

²⁶² Cohen, 'Who is Starving Whom?', 73.

²⁶³ Cohen, 'Who is Starving Whom?', 74.

²⁶⁴ For example, Germany, which is often suggested to bear a disproportionate share of burdens in refugee protection within EU, is also a strong advocate of institutional reforms that aim towards institutionalised burden-sharing among the EU states. Eiko Thielemann, 'Between Interests and Norms: Explaining Burden-Sharing in the European Union', *Journal of Refugee Studies*, 16 (2003), 260-262. As also Astri Suhrke points out, 'sharing proposals authored by states have typically come from governments trying to relieve what they perceive as a disproportionate influx on their own territory'. Astri Suhrke, 'Burden-Sharing during Refugee Emergencies: The Logic of Collective versus National Action', *Journal of Refugee Studies*, 11 (1998), 397.

circumstances surrounding them instead of strictly what follows from a particular theory on the distribution of responsibilities.²⁶⁵ Once there are sufficient counterweights against non-compliance in place within the global regime dedicated to the protection of the right to asylum, the issue of incentives does not constitute an insurmountable problem. The shifting of moral obligations surely constitutes one consideration when a state is reasoning whether or not to comply with the requirements of justice, but it is not the only reason. Apart from normative considerations, the final decision of a state regarding compliance depends on the calculation about the incentives for compliance and about the disincentives for non-compliance. This essentially means that a state's final decision to comply with the requirements of justice in global protection of the right to asylum can be strongly influenced by the particular form of the global institutional regime.

6.3 The stringency of obligations in the protection of the right to asylum

If the conclusion reached in the previous section is correct, this entails that in circumstances of partial compliance citizens of complying states with capacities to assist can have an obligation of justice to bear burdens of non-complying states. Then the question becomes, how stringent is the complying states' obligation to assist refugees? How much does justice require that citizens of a complying state sacrifice for global refugee protection regardless of the sacrifices of citizens in other states? So far, I have refrained from examining this question more closely. In general terms, it may be said that there is an 'absolute floor' for each state in relation to its capacities to assist, and this floor marks the point after which the citizens of a complying state are no longer obligated to assist right-bearing refugees. Whether a state's burden in refugee protection actually reaches the absolute floor is dependent primarily on three factors. Firstly, it depends on how much overall effort is required for all persons to have their right to asylum protected, i.e., on the magnitude of the refugee problem. The second relevant factor is the general level of compliance in the global efforts to realise the right to asylum. If the number of complying states is high,

²⁶⁵ In the current global refugee regime, which does not include any meaningful enforcement mechanisms to advance refugee protection, states hold that it is beneficial for them not to become members of burden-sharing schemes. They hold that the same bundle of resources used to deal with the Convention refugees can be allocated 'more wisely' to promote national interests.

it is less likely that the absolute floor will be reached by each particular complying state. In turn, the lesser the general level of compliance, the more likely it is that the complying states would not have sufficient capacities to assist all the needy refugees. Thirdly, whether a state reaches the absolute floor is dependent on where exactly the absolute floor will be located.

It is important to recognise that the establishment of an absolute floor is a central part of any account of obligations in global refugee protection.²⁶⁶ Put differently, the issue of the absolute floor is a general question in the theory of obligations in global refugee protection that requires answering, and any positive account faces the task of providing satisfactory reasons as to why exactly the absolute floor should be located in one place rather than some other place. As I argued in the second chapter, the right to asylum is essentially a right for the protection of basic needs, which in turn are of fundamental importance to the pursuit of comprehensive conceptions of the good. Put differently, basic needs, from which the right to asylum derives its moral weight, are of universal value due to the fact that these needs are not directly tied to any comprehensive doctrines, and morally weighty because their satisfaction is a central precondition for the existence of a moral agent. As the right to asylum may be considered as a fundamentally weighty normative resource base that can ground obligations of justice, it seems reasonable to conclude that the obligations of complying states with the capacity to assist are at the very least moderately stringent regardless of the compliance and non-compliance of other states.²⁶⁷ If this conclusion is correct, citizens of each state have a duty of justice to sacrifice at least a moderate range of their personal projects and collective national projects for the global protection of the right to asylum regardless of other states' compliance and non-

²⁶⁶ This is the case even for an approach recognising that complying states are not obligated to bear non-complying states' burdens. In his account of moral obligations under circumstances of partial compliance, Liam Murphy questions the possibility of establishing a fixed absolute floor on duties of assistance beyond a stringent absolute floor of the kind outlined by Peter Singer. Murphy, *Moral Demands in Nonideal Theory*, 64-70. See also Peter Singer, 'Famine, Affluence and Morality', *Philosophy and Public Affairs*, 1 (1971), 229, 231.

²⁶⁷ For an insightful account on moderately stringent duties of assistance, see Garrett Cullity, *The Moral Demands of Affluence* (Oxford: Oxford University Press, 2004), esp. ch. 8 and ch. 9. See also Samuel Scheffler, 'Morality's Demands and Their Limits', *The Journal of Philosophy*, 83 (1986), 531-537.

compliance.²⁶⁸ On this ‘moderate approach’ to the protection of the right to asylum, personal and national projects are understood to have certain universal value, and there is no obligation of justice on persons to give up all for the sake of protecting other persons’ fundamental rights.

But should we go beyond this conclusion and accept that the obligations of justice on the complying states are more than moderately stringent? It might be argued that the absolute floor should instead be set at the level that only the right to necessities remains sufficiently protected to the citizens of a state assisting the right-bearers.²⁶⁹ This stringent approach to the absolute floor effectively holds that the possible lack of opportunity for citizens of a state to pursue national and personal projects is secondary to the plight that the right-bearers are facing.²⁷⁰ In the current work, I will stop short of examining further the complex question regarding whether we should embrace a more stringent account of the absolute floor than the moderate account.²⁷¹

²⁶⁸ As Robert E. Goodin points out, ‘a morality that was never prepared to make any demands would be a pretty useless morality. The point of morality is to be action-guiding.’ Robert E. Goodin, ‘Demandingness as a Virtue’, *The Journal of Ethics*, 13 (2009), 3. Similarly, Zofia Stemplowska notes that while we should be careful in formulating demands on people, we should not abstain from making them. ‘After all, abstaining from making demands is not a morally neutral position we can fall back on’. Stemplowska, ‘What’s Ideal About Ideal theory?’, 333-334.

²⁶⁹ This interpretation of the absolute floor follows closely an argument outlined by Peter Singer in *Famine, Affluence, and Morality*, although it is formulated in the framework of rights protection. In his famous essay, Singer offers an extremely stringent interpretation of duties of assistance, claiming that ‘if it is in our power to prevent something very bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do it’. Singer, ‘Famine, Affluence, and Morality’, 229, 231.

²⁷⁰ It should be noted that it is possible to imagine circumstances of partial compliance where requirements of refugee protection become excessive even if states are required to sacrifice their citizens’ well-being to the point of the right to necessities in refugee protection. For example, in the current world it most likely would constitute excessive burdens for a single complying Scandinavian state to attempt to accommodate all persons eligible for protection under the Convention. As well, we can imagine circumstances of full compliance among world’s states in which the overall burdens becomes excessive for the states to bear. For example, in a world at war the small collective of states able to remain outside the war would not in all likelihood have sufficient capacities to assist all the needy refugees fleeing from the war-ridden states even if they sacrificed their citizens’ well-being to the point of the right to necessities.

²⁷¹ One possible way to approach the question might be to focus on examining the point which duties of justice can be argued to be over-demanding. The over-demandingness objection was originally targeted against act-utilitarian moral accounts that can require persons to give up all their personal commitments and fully commit to assisting strangers. For a thorough enquiry on the idea of over-demandingness, see Murphy, *Moral Demands in Nonideal Theory*, ch. 2. and 3. See also Scheffler, ‘Morality’s Demands and Their Limits’, 531-537. Scheffler distinguishes four possible responses to the criticism of over-demandingness. 1) To abandon the theory for a less demanding one, 2) to restrict the scope of moral demands in human lives, 3) to argue that morality altogether deserves less respect than is generally given to it, or 4) to reject that over-demandingness constitutes any type of a criticism

Put differently, the argument outlined here suggests only that the obligations of the complying states are ‘at the very least moderately stringent’.

It can be pointed out, however, that the stringent understanding of the location of absolute floor leaves a fairly broad gap between ‘is’ and ‘ought’. The stringent absolute floor can require that an unlucky complying state facing a massive refugee crisis on its every border becomes effectively a refugee camp, and that its citizens can be required to dedicate their full attention to the plight of the refugees perhaps for years if not decades to come. Prolonged civil wars can entail that the state needs to be maintained as a refugee camp for the foreseeable future, and the citizens of the state may have no meaningful opportunity to pursue their personal life and national projects. Put differently, in some instances the stringent absolute floor can demand that citizens of a state act akin to ‘moral saints’ who have no partialist commitments, and no shared national projects beyond the protection of the right to necessities.²⁷² Thus, a defender of the stringent account faces the task of showing that justice does not only require moderately stringent sacrifices in circumstances of partial compliance, but that at times it can also require that we act like moral saints.

In practical terms, what can we make of the fairly general conclusion outlined here? Firstly, it entails that states’ responses to matters of global refugee protection should not be completely a matter of internal democratic decision-making. A central problem in leaving the judgment on the final extent of refugee protection to members of each state is the possibility of insidious judgments. It may be reasonably asked what stops members of a state from making insidious judgments regarding their obligations towards right-bearing refugees if the final judgment is left to democratic processes. The recent wave of political anti-refugee and anti-immigration rhetoric in

towards a moral theory. For an argument against the demandingness objection, see David Sobel, ‘The Impotence of the Demandingness objection’, *Philosopher’s Imprint*, 7 (2007), 1-17.

²⁷² On cultural objections as justificatory grounds for limiting immigration, see for example Michael Walzer, *Spheres of Justice – A Defence of Pluralism and Equality* (Oxford: Blackwell, 1983), 39. Walzer argues that ‘the distinctiveness of cultures and groups depends upon closure and, without it, cannot be conceived as a stable feature of human life’. He claims that ‘at some level of political organization, something like the sovereign state must take shape and claim the authority to make its own admission policy, to control and sometimes restrain the flow of immigrants’. For a more sceptical view on cultural claims as justification for limiting immigration, see Samuel Scheffler, ‘Immigration and the Significance of Culture’, *Philosophy & Public Affairs*, 35 (2007), 93-125.

many European countries provides strong evidence of insidious judgments. Regardless of how low the final number of refugees is that a state accommodates, many citizens maintain that their state is bearing excessive burden beyond moral duty.

Finnish asylum policies and the current political climate may be considered as a real world example. According to the Human Development Index (HDI), which apart from per capita GDP takes into consideration also life expectancy and education, Finland has a 'very high' level of human development, ranking 16th of the 182 countries in the Index listing.²⁷³ The country currently has 5.3 million inhabitants, and it has the lowest population density of the countries in the European Union with 16 inhabitants/km². Finland also has per capita GDP \$44,491 (nominal).²⁷⁴ In other words, as it currently stands, Finland is not only one of the highest ranking country in the world with respect to human development, but also a very scarcely populated country.

In the year 2009, there were altogether 5988 individual asylum claims filed in Finland. However, only 1373 of the applicants were finally granted asylum.²⁷⁵ This entails that the total increase in the country's population due to Convention refugees in 2009 was minimal, around 0.02 per cent. Finland is also currently facing a populist anti-immigration and anti-refugee tide, and there is strong pressure on the government to reduce the number of asylums granted. A central political message of the right-wing party True Finns is that Finland should be open strictly to immigration that is either 'neutral' or 'beneficial' to it. Put differently, the True Finns are suggesting in their party manifesto that Finland should reject entry from all incoming

²⁷³ Human Development Index (HDI) - 2010 Rankings. Available online: <http://hdr.undp.org/en/statistics/> (accessed 19.07.11).

²⁷⁴ In comparison, for example Haiti, which currently faces a humanitarian crisis of great urgency, has more than twenty times higher population density than Finland, with 361.5 inhabitants/km². It is also the 145th most developed country according to the HDI, and has per capita GDP \$733 (nominal).

²⁷⁵ Finnish Refugee Centre Asylum Statistics 2010. Available online: http://www.pakolaisneuvonta.fi/index_html?lid=71&lang=eng (accessed 19.07.11). The number of granted asylum applications has actually increased in the past couple of years. In 2008, Finland granted asylum to 860 refugees, and in 2007 to 785 refugees.

migrants it considers as a 'burden'.²⁷⁶ This political message of partiality caused a victory for the party in recent parliamentary elections, and it caused a great shock to the whole Finnish political landscape.

The implications of the election seem to be that the future government has a strong political mandate from the constituency to reduce Finland's intake of any refugees it considers as 'burdens' from the current minimal figures. But if the previous conclusion regarding obligations of assistance is correct, we should not accept that the current Finnish government has a justification to reduce its refugee intake.²⁷⁷ To let Finland decide democratically on its refugee policies is essentially to commit to a strongly relativistic view of refugee protection. To leave the final judgment on the extent of refugee protection to states' democratic processes can mean that the most affluent scarcely populated countries in the world can legitimately conclude that they are currently bearing at the very least sufficient if not excessive burden, regardless of their actual assistance to right-bearing refugees.

Secondly, on the grounds of the claim that states are obligated to sacrifice at the least a moderate range of their personal and national projects for the global protection of the right to asylum regardless of other states' compliance and non-compliance it can be reasonably argued that not all states are adequately discharging their citizens' duties. Again, consider Finland as an example. With its 1373 accepted asylum applicants and very high level of human development, it seems that Finland is far from sacrificing any national projects for the sake of global protection of the right to asylum. As well, once the burden is distributed to the country's 5.3 million citizens, the practical impacts for the citizens' personal projects are also non-existent.²⁷⁸

²⁷⁶ True Finns party manifesto 2011, 42. Available online (in Finnish): <http://www.perussuomalaiset.fi/getfile.php?file=1536> (accessed 19.07.2011).

²⁷⁷ On the link between democratic theory and border controls, see Arash Abizadeh, 'Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders', *Political Theory*, 36 (2008), 37-65. For Miller's critical response to Abizadeh, see David Miller, 'Why Immigration Controls Are Not Coercive: A Reply to Arash Abizadeh', *Political Theory*, 38 (2010), 111-120.

²⁷⁸ In turn, Pakistan seems to have discharged more than sufficiently its obligations in global refugee protection. This is centrally because Pakistan is at the moment unable to protect many of its citizens' right to necessities sufficiently. As for example a UNHCR report in January 2011 pointed out, there are over a million 'internally displaced persons' in Pakistan. Available online: <http://www.unhcr.org/pages/49e487016.html> (accessed 19.07.2011).

In more general terms, in 2008 there were altogether around 42 million persons worldwide who were recognised by the UNHCR as ‘forcibly displaced’.²⁷⁹ Simultaneously, there was an estimate of 1.2 billion people living in countries the UN identifies as ‘more developed’. These countries comprise European and North American countries, Australia, New Zealand, and Japan.²⁸⁰ A comparison with the Human Development Index shows that of the list of countries with ‘very high human development’, the first 20 are also on the UN list of more developed countries.²⁸¹ If all those ‘forcibly displaced’ were provided asylum in one of the more developed countries, this would increase the total population in these countries by 3.5%. Even if in the current political climate it is unfeasible that all the forcibly displaced will be provided asylum in one of the more developed countries, the increase in population seems altogether moderate in relation to the level of human development in these countries.²⁸²

Conclusion

In the current chapter, I have examined obligations in the protection of the right to asylum in circumstances of partial compliance. I started by outlining an argument suggesting that citizens of complying states are not obligated to bear burdens of citizens in non-complying states in the global protection of the right to asylum. Then, I moved to outline three arguments against this view. In the last section, I examined more closely the complex question regarding stringency of obligations in the protection of the right to asylum. I claimed that we should consider the obligations of the complying states to be at the very least as moderately stringent regardless of the compliance or non-compliance of other states, and examined some practical implications of this general conclusion.

²⁷⁹ UNHRC, Global Trends 2008, 3. Available online: <http://www.unhcr.org/4a375c426.html> (accessed 19.07.11).

²⁸⁰ Population Reference Bureau, World Population Data Sheet 2008, 7, 15. Available online: http://www.prb.org/pdf08/08WPDS_Eng.pdf (accessed 19.07.11).

²⁸¹ Human Development Report 2007/2008, 229. Available online: http://hdr.undp.org/en/media/HDR_20072008_EN_Indicator_tables.pdf (accessed 19.07.11).

²⁸² This conclusion is also strengthened by the observation that the projected population growth between 2008-2050 in the more developed countries is +5%, while in the ‘least developed countries’ that in 2008 had total population of 797 million the projected growth is +109%.

7. Conclusion

In the current work, I have examined the moral right to asylum. The central argument of the thesis has been the following: the right to asylum is a derivative right grounded in the more fundamental right to necessities, which can be understood as a universal entitlement to the satisfaction of basic needs. More specifically, I have argued that all persons whose right to necessities is insufficiently protected in their home state have the right to asylum – rather than the more general right to be assisted – when they cannot be assisted with other remedial instruments by the international community within a reasonable timeframe. The account of the right to asylum I have offered in the thesis follows a pragmatic understanding of rights. On this approach, when we are concerned about rights we should also be concerned about their protection, i.e., we should not strictly focus on pre-institutional circumstances of having rights but also on the institutionalisation of rights. Rights are practically useless for persons without institutions that provide a sufficiently secure access to their content. Apart from examining the right to asylum *qua* universal right, I have focused on examining the moral nature of the existing institutions of refugee protection, alternative institutional arrangements, and obligations citizens of complying states have towards refugees under the circumstances of partial compliance.

In our current world states are reluctant to expand their legal obligations towards foreigners, and there is a genuine fear that any attempt to renegotiate the Convention would lead to even more limited global institutions of refugee protection than the ones currently existing.²⁸³ While states do continue to proclaim a willingness to assist non-citizens on humanitarian grounds, many states are nevertheless strongly committed to ‘a pattern of defensive strategies designed to avoid international legal responsibility toward involuntary migrants’.²⁸⁴ If the conclusion outlined in the

²⁸³ The UNHCR, for example, considers that any initiative to modify the Convention in the current political environment ‘could result in a lowering of protection standards for refugees and even undermine the international refugee protection regime altogether’. UNHCR, *Climate change, natural disasters and human displacement: a UNHCR perspective 2010*, 9. Available online: <http://www.unhcr.org/4901e81a4.html> (accessed 19.07.11).

²⁸⁴ James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005), 998.

current work is correct, states' reluctance to strengthen the refugee protective institutions deserves moral condemnation. Justice requires that states take meaningful steps to replace the currently existing global refugee regime with a moral refugee regime. If all persons may be said to have the right to asylum under certain circumstances of deprivation, this right functions as a foundation from which the obligation to establish effective and well-functioning moral refugee regime can be derived.

The establishment of a moral refugee regime is an important diversion from the UN Convention Relating to the Status of Refugees, which constitutes the central foundation for the existing refugee regime. The existing global refugee regime, which was originally established to address displacement within Europe, may have served an important humanitarian as well as political function, but these functions do not constitute sufficient reasons to maintain the *status quo*. The recognition of the moral right to asylum essentially amounts to a call for restructuring the institution of asylum on the grounds of need, and to a call for broadening the definition of refugee beyond the Convention definition. The existing refugee regime does not adequately recognise, for example, that there can be persons facing environmental harms that not only threaten basic needs, but also that these harms cannot be effectively addressed with any other instrument than asylum.

In addition, the shift to a moral refugee entails abandonment of many state practices towards asylum seekers, including *non-entrée* practices, coercive repatriation, and deportation to 'safe countries'. As Joseph Carens rightly points out, 'external deterrence is not significantly different, in moral terms, from denying an application for asylum. If we take steps to keep refugees from applying asylum in our state, we become morally responsible for their fates'.²⁸⁵ The recognition of 'safe countries' faces similar problems. Some states hold that if an asylum applicant is arriving from a 'safe country' the applicant becomes liable to return to that country. Some

²⁸⁵ Joseph Carens, 'The Philosopher and the Policymaker: Two Perspectives on the Ethics of Immigration with Special Attention to the Problem of Restricting Asylum', in Martin Hailbronner, David A. Martin and Hiroshi Motomura (eds.), *Immigration Admissions* (New York: Berghahn Books, 1997), 33.

countries are considered as generally safe due to number of factors, including human rights record and political circumstances.²⁸⁶ The interpretation of certain countries as generally safe is problematic due to the fact that such generalisation overlooks the possibility that in instances of particular asylum seekers the country is not necessarily safe. In the words of Guy Goodwin-Gill, 'how can we be sufficiently sure that even the most respectable and reputable of regimes has not, just this once, produced a refugee?'²⁸⁷ From the moral perspective the general probability of a person being safe in her home country should not have impact on the prospects of the person to have access to asylum. Each asylum applicant's eligibility for asylum should be considered on the merits of the individual cases rather than on the grounds of the general level of safety in the departure country.

The establishment of a moral refugee regime entails also the abandonment of the institutional framework in which the principle of state sovereignty has an overriding position. Put differently, the establishment of a moral refugee regime entails the recognition of binding positive obligations on states to provide asylum, and the abandonment of the *non-refoulement* principle as the central mechanism of distributing refugees between states. While the *non-refoulement* principle clearly has an important role in a moral refugee regime, a moral refugee regime is also dedicated to fair distribution of burdens between the duty-bearers and the enforcement of the obligation to assist bearers of the right to asylum.

In the thesis I also pointed out that while the global refugee regime is a second-best mechanism for the protection of the right to necessities, this does not mean that it does not have an important function. This is partly due to the fact that for the foreseeable future we are destined to live in a world where some states fail to satisfactorily protect their citizens' right to necessities. But even if the best possible circumstances in the protection of the right to necessities were reached, there are still reasons to have a refugee regime in place. In circumstances where all persons' right

²⁸⁶ See for example Nadine El-Enany, 'Who is the New European Refugee?', *European Law Review*, 33 (2008), 318.

²⁸⁷ Guy S. Goodwin-Gill, 'Safe Country? Says Who?', *International Journal of Refugee Law*, 4 (1992), 248-250.

to necessities is sufficient protected in their home states the global refugee regime still might serve as a back-up safety-valve. It can be understood as ‘insurance policy’ that remains in its place for unforeseeable circumstances under which there is a need for alternative ways to access the content of the right to necessities. But in the end, this type of speculation regarding the relevance of the global refugee regime is premature. We are far from a point where we can even have a meaningful debate on whether or not the global refugee regime constitutes a redundant back-up mechanism for the protection of global entitlements. There are still millions of persons around the world who do not have sufficiently secure access to the content of the right to necessities, and for many of these persons asylum constitutes the only meaningful remedy.

When examining more closely the institutionalisation of the right to asylum, I pointed out that the question of what exactly should be the more specific form of mediating institutions on the interstate level is a complex one, and that the answer depends partly on contextual considerations. As institutions need to be fitted to their circumstances, there is no one-size-fits-all model that can be applied in every possible context. Yet, this does not entail that we would be fully without guidelines in the establishment of a moral refugee regime in more practical terms. The right to asylum, other considerations of justice, and efficiency offer us context-independent guidelines on institution-building. In the thesis I focused on examining more closely a specific institutional scheme that could perfect imperfect duties in the protection of the moral right to asylum on the interstate level. I defended this scheme, called the tradable quota scheme, against moral criticism. I examined three objections against the tradable quota scheme, and suggested that these objections do not undermine the appeal of the scheme in any meaningful way. I also examined the appeal of the scheme in relation to other institutional proposals. While I stopped short of offering a conclusive comparative moral evaluation of the tradable quota scheme, I suggested nevertheless that there is strong support for the conclusion that the tradable quota scheme offers a policy proposal for institutionalising the right to asylum which is more appealing than the compensatory scheme and at the very least as appealing as the physical burden-sharing scheme.

While the establishment of a global institutional scheme dedicated to the protection of the moral right to asylum would be appealing, in the current circumstances the political climate is not favourable for a global burden-sharing scheme. Regional schemes are more likely to be established before any implementation of a global institutional scheme, and at the moment the only region where there is any likelihood for political agreement on an interstate burden-sharing system in the context of refugee protection is Europe.

But it is important to recognise that states seem to systematically overlook the possible benefits of complying with demands of refugee protection and establishing comprehensive burden-sharing schemes.²⁸⁸ As a consequence of the establishment of a burden-sharing scheme the migratory movement of the destitute would become more predictable, and states would not have to have extensive unilateral contingency plans for humanitarian crises. Furthermore, the failure to establish a comprehensive interstate burden-sharing scheme that leads to more extensive protection of the right to asylum than the currently existing refugee protective institutions can feed bitterness in the destitute worldwide, which in turn provides a fertile ground for recruiting terrorists. If, as some projections suggests, by 2050 some 150 million people will be in need of asylum due to climate change, there are not only strong reasons of justice, but also strong reasons of national interest for all states to start working for cooperative solutions on refugee accommodation and burden-sharing.²⁸⁹

In the current political climate, the compensatory scheme constitutes probably the most feasible policy proposal for burden-sharing scheme. It is currently implemented in a preliminary regional form. The European Refugee Fund, which has a budget of 628 million Euros for the period 2008 – 2013, distributes funds for refugee protection among EU member states on the basis of ‘objective criteria relating to the

²⁸⁸ As Astri Suhrke points out, ‘by institutionalising the sharing in accordance with agreed principles of equity, states can discharge these obligations in a manner that simultaneously promotes national interests’. Astri Suhrke, ‘Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action’, *Journal of Refugee Studies*, 11 (1998), 398.

²⁸⁹ Satvinder Singh Juss, *International Migration and Global Justice* (Aldershot: Ashgate, 2006), 222-223.

number of asylum seekers and integrating persons benefiting from international protection'.²⁹⁰ The Fund may be argued to constitute an institutional scheme that is perfecting the imperfect duties of citizens in European countries, and it aims to distribute burdens of refugee protection in a fairer way than the *non-refoulement* principle. The establishment of the Fund may be considered as a small step away from the existing morally unsatisfactory refugee regime.²⁹¹

In addition to The European Refugee Fund, in the current world also other modest perfecting mechanisms for imperfect duties may be argued to exist on the interstate level. The UNHCR, which receives its annual budget (\$2,78 billion for the year 2011) from the UN member states, may be considered as an institution that is currently perfecting the imperfect duties corresponding to the right to asylum.²⁹² Some UN member states have also committed to accommodating annual quotas of UNHCR refugees. In other words, by binding themselves to annual quota obligations some states have moved to perfect their imperfect duties towards bearers of the right to asylum. The UNHCR resettlement programme constitutes a preliminary institutionalised system of physical burden-sharing which could, with certain measures of redesign, provide a template for a more comprehensive institutional scheme. Every year with the help of UNHCR a number of vulnerable Convention refugees are resettled to a range of 'quota countries'. Since 2008, the number of quota countries has doubled from 12 to 24, and in 2010 the 24 resettlement countries provided nearly 80,000 places for UNHCR resettlement submissions.²⁹³

²⁹⁰ European Commission Home Affairs, The European Refugee Fund 2011. Available online: http://ec.europa.eu/home-affairs/funding/refugee/funding_refugee_en.htm (accessed 19.07.11). See also Eiko Thielemann, 'Between Interests and Norms: Explaining Burden-Sharing in the European Union', *Journal of Refugee Studies*, 16 (2003), 261-262.

²⁹¹ But it should be noted that if the argument outlined in the current work is correct, then it remains the case that the compensatory scheme constitutes the second-best solution to the institutionalisation of the moral right to asylum when compared to the tradable quota scheme.

²⁹² UNHCR, Biennial Programme Budget 2010-2011 of the Office of the United Nations High Commissioner for Refugees 2009, 30. Available online: <http://www.unhcr.org/4abc7cc19.html> (accessed 19.07.11). The budget of the UNHCR, although still insufficient compared to the magnitude of the existing humanitarian problems, has grown from US\$300,000 in its first year to nearly US\$3 billion.

²⁹³ The number of 80,000 resettled Convention refugees represents only about 10 per cent of those who according to the UNHCR are actually in need of resettlement. The UNHCR estimates that globally about 805,500 persons are currently in need of resettlement. UNHCR, Projected Global Resettlement Needs 2011, 3. Available online: <http://www.unhcr.org/4c31e3716.html> (accessed 19.07.11).

Let us conclude the enquiry with some considerations regarding possible themes for future enquiries. In the current study I have covered a range of normative issues related to refugee protection, but there are still plenty of issues that are worth of further study. Firstly, it might be examined what kind of account of the right to asylum – if any – could be outlined on the grounds of a theory of global justice that recognises distributive obligations beyond the entitlement to a decent life. In the current work I offered a ‘sufficientarian’ account of the right to asylum. This way of deriving the normative weight of the right to asylum suggests that the final form of the global refugee regime is linked closely to global obligations of distributive justice. There is a requirement justice to establish a moral refugee regime due to the fact that citizens of all states have a universal entitlement to certain basic opportunities and goods. In the study, I did not consider whether the scope of distributive obligations between states extends beyond the right to necessities. In other words, the account of global justice that has been offered in the current study may be understood as an incomplete account, and there still remains unanswered questions on whether beyond the point of decent life in which basic needs are globally met goods should be distributed within and between political communities according to merit, desert, or some other principle of distribution.

If there are in fact global distributive obligations beyond the protection of the right to necessities, then it can of course be asked whether a case might be made for a completely different type of universal right to asylum, i.e., a right to asylum that extends beyond the protection of basic needs. At least it is surely the case that a global refugee regime that is committed to the protection of those who are discriminated against and those who do not have their non-fundamental entitlements sufficiently protected in their home states is imaginable. Such a regime would follow strongly egalitarian principles, and would serve as an instrument of global equality.

But it should be noted that even if a valid argument for a more extensive right to asylum would be successfully outlined, I believe there are still strong reasons to consider those whose basic needs are not sufficiently protected in their home

countries as a distinct category of persons in a moral refugee regime. The satisfaction of basic needs is a matter of moral urgency, and those who are deprived of their basic needs are not only denied the opportunity to pursue a flourishing life but altogether the opportunity to live a decent life. This view of the global refugee regime and its central functions may be said to follow the idea of ‘prioritarianism’, which essentially suggests that one ought as a matter of justice aid the unfortunate, ‘and the more badly off someone is, the more urgent is the moral imperative to aid’.²⁹⁴

Another reason for recognising those whose basic needs are at stake as a separate category of persons is more practical. There will need to be a lot of changes in the global political climate before asylum as an institution can be expanded to cover the protection of non-fundamental entitlements as well. In fact, a lot of changes need to occur in the political climate before effective institutions for the protection of the kind of right to asylum outlined in the current study are established. While there exist political debates on the extent to which for example environmental harms should be taken into consideration when considering asylum applications, politically we are far from a point where the institution of asylum is restructured in such a way that it covers also non-persecuted persons. To recognise these practical limitations in the restructuring of the global refugee regime is not to say that it would not be desirable if we could realise egalitarian aims of global justice more comprehensively with the refugee regime. Rather, it is to say only that we should start the efforts of moving towards more just world from somewhere, and that somewhere is the most fundamental needs and the most feasible political advancements.

Secondly, it would be worthwhile to examine more closely the issue of obligations in the protection of the universal right to asylum. One possibility is to examine the relationship between moral responsibility regarding the reasons of deprivation and obligations of assistance. For example, in the current global refugee regime founded on the Convention the provisions of protection do not apply to any persons who have committed ‘crimes against peace’, ‘war crimes’, ‘crimes against humanity’, or ‘serious non-political crimes’. It could be examined more closely how the stringency

²⁹⁴ Richard Arneson, ‘Luck Egalitarianism and Prioritarianism’, *Ethics*, 110 (2000), 343.

of obligations in the protection of the right to asylum is related to the more specific reasons why persons are in need of asylum. In the end, it does not seem unreasonable to suggest that there is at least some kind of link between the moral responsibility and the stringency of the obligations of others to assist. Closer examination of this link would complement the current research.

Thirdly, one possibility is to focus more closely on the issue of compliance and non-compliance. The moral refugee regime should obviously be established in such a way that it also advances compliance. In other words, appropriate deterrence against non-compliance and incentives for compliance should be in place. While citizens of complying states can have the obligation to bear more than their fair share of burdens in global protection of the right to asylum, the aim nevertheless should be an institutional framework where there is no need to divert from fair of distribution of burdens. It could be examined what exactly are the more practical elements of a moral refugee regime that can advance compliance, and what are the legitimate limits of deterrence? What kind of deterrence the international community can impose on non-complying states, and who should decide and oversee their use?

Finally, as I pointed out in the introduction, the possible special right to asylum that persons may have against particular agents due to past wrongdoings of other agents is an important topic of enquiry. An enquiry on the special right to asylum would strengthen further the moral case for obligations to protect non-citizens, and would also provide an additional guideline for the establishment of a moral refugee regime. All things considered the global refugee regime should of course be established in such a way that it not only takes into consideration the universal right to asylum persons have, but also the special remedial rights against particular agents. Those who are primarily responsible for persons' plight should be held accountable for their wrongful actions.

In more general terms, it cannot be emphasised enough that the examination of the moral dimensions of refugee protection is increasingly important, and philosophers should not shy away from introducing 'realistic moral arguments' that can be easily

accessed by persons without strong philosophical background. Real persons' basic needs are at stake in access to asylum, and for them ideal conclusions regarding open borders are not much of consolation. Ideal theory has its place, but due to the urgency of needs in question philosophers should not shy away from moral enquiries that overlap with advocacy. Politics needs moral guidelines, and philosophers may assist in producing these guidelines by examining why particular policy proposals may be considered to be unjust or just.

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